

LITIGATING RACIAL JUSTICE ISSUES

SAN FRANCISCO PUBLIC DEFENDER JEFF ADACHI



Contents

Introduction	1
Racial Justice Statistics	6
Race and Voir Dire*	17
Bail and Disparate Confinement of People of Color and the Poor	70
Selective Prosecution	135
Racial Profiling/Motions to Suppress Evidence	291
Blueprint for Racial Justice	301

**A New Approach to Voir Dire on Racial Bias, copyright 2016, used by permission*

10 Things Public Defenders Can Do To Stand Up For Racial Justice

By San Francisco Public Defender Jeff Adachi

The wheels of justice may turn slowly, but they still flatten countless Americans trapped beneath their weight.

We'll look back at this moment in history as a tipping point: When entire communities scarred from police brutality and weary from racial profiling looked upon the broken bodies of unarmed citizens and said "enough is enough." When the Black Lives Matter movement harnessed the frustration wrought by mass incarceration and delivered it directly to Main Street.

Next stop: the courtroom. And there is nobody in the system more qualified to confront bias and demand change than public defenders.

There are more than 25,000 public defenders and thousands more legal aid attorneys across the country who fight like hell for the rights of their clients. Most of these clients are black and brown. All are poor.

The color of our clients matters because U.S. criminal justice system has a race problem. Uncontroverted studies show African Americans are more likely to be stopped, detained, imprisoned and convicted than their white counterparts. Many roads lead to this morass of racial disparity: biased policing, prosecutorial overcharging and explicit and implicit bias by judges who set bail and sentence persons convicted of crimes.

It is public defender clients who bear the brunt of racial discrimination. **The fact is, we are already in the trenches.** So let's brush up on our fighting techniques. Here are 10 things that public defenders can do to litigate racial justice issues in court:

1. Talk About Race With Prospective Jurors.

In cases where the race of the accused is an issue, or there are other issues such as cross-racial identification, public defenders must screen jurors who may hold biases that affect their decision-making. This includes discussing implicit bias, the unconscious cognitive processes that causes us to rely on stereotypes in our judgments. The U.S. Supreme Court has held that lawyers have a constitutional right to question jurors on racial prejudices when a "reasonable probability" exists that such views would affect their ability to be fair.



2. Insist on Diverse Juries

While we are often reminded that we are entitled to a jury of our peers, the reality can be quite different. In San Francisco, we recently convened a panel of 90 prospective jurors for the trial of our black client. There wasn't a single African American in the bunch. A study by Duke University found juries formed from all-white jury pools convicted black defendants 16 percent more often than white defendants. Public defenders should make note when there are no minorities on a jury and even consider filing to jury challenge when the panel is not representative of the client's community.

3. Report Prosecutors Who Use Their Peremptory Challenges to Strike Black Jurors Without Just Cause

The High Court ruled in the landmark *Batson v. Kentucky* that prosecutors cannot use their jury challenges to strike a person due to race. Unfortunately, the practice remains rampant according to recent studies. Public defenders need to make *Batson* challenges whenever prosecutors exercise their challenges in a discriminatory manner. Prosecutors who violate their oath of fairness can also be reported to the state bar for discipline.



4. Report and Challenge Biased Judges

Most states have ethical codes that prohibit judges from discriminating based on race. Yet studies have shown that judges are as susceptible to the same explicit and implied biases that plague all of us. Statutes often allow parties to challenge a judge who has expressed racial biases, and public defenders should raise these challenges when grounds exist. Judges who express bias should also be reported to judicial discipline bodies.

5. Insist on Bail Hearings & Raise Racial Disparities in Pre-trial Incarceration

Studies have shown that minorities are more likely than whites to be held in jail while awaiting trial. Many jurisdictions disproportionately confine people of color by setting unreasonably high bails. Public defenders can and should demand bail hearings, even after bail is set, to challenge the amount and raise the issue of disproportionate confinement. We recently began doing this in San Francisco, and experienced a 30 percent success rate in winning freedom for our clients or reducing their bail.

Court Watch 2015



6. Sponsor a Court Watch Program

Why has police brutality received so much more attention than injustice in the courtroom? Because what happens in court is largely hidden from the public's view. Many Americans are surprised to discover they have a right to watch what happens inside the halls of justice. San Francisco's Court Watch program encourages community members and youth to attend court hearings. The group confers with public defenders to learn more about the system and its treatment of minorities, so they may become watchdogs of fairness in the courtroom.

7. Identify Unfair Charging Patterns By Prosecutors

Public defenders should review their cases to determine if the prosecution is charging individuals of one race differently than another. Recently, I had a case where a young African American man with no prior record was charged with felony gun possession while a white man accused of the same crime under similar circumstances was charged as a misdemeanor. Raising this glaring inequity resulted in a favorable outcome for my client. In another local case, the federal public defender made a motion for discriminatory prosecution following drug stings in which all 37 people arrested were African American. One of the officers involved in the arrests was caught on video directing his team to arrest an African-American rather than a non-African American alleged drug dealer.

8. Collect Statistics

Unless you can show the data, you're just acting on a hunch. Public defenders can play a vital role by collecting statistics on illegal stops and searches, racial profiling and other forms of police or governmental misconduct. San Francisco recently passed legislation requiring the police department to keep statistics on the race and gender in all of its traffic stops, detentions, arrests and searches. San Francisco's Reentry Council also commissioned a report quantifying unequal treatment from arrest to sentencing.



9. Form a Racial Justice Committee

Harness your collective power by organizing to propose solutions to eradicating racism in the system. Our office formed a racial justice committee in 2013, and the committee was successful in implementing a 9 point plan for reform, which included body cameras, collection of race statistics and other initiatives. Our attorneys also banded together with public defenders from other counties to create the Bay Area-wide Public Defenders for Racial Justice, which provides valuable training. Draw from the collective brain trust in your office and work with other agencies, such as the ACLU, Black Lives Matters and local legislators to implement needed system reforms.



10. Let Your Clients Know You Care

As public defenders, we often become jaded to the system treating people differently based on their race. It may seem like a hopelessly entrenched problem. But we need to talk with our clients about these realities so they will be empowered to stand up for justice in their own case—whether that means going to trial, or simply understanding their public defender “gets it” and is sensitive to the struggle going on in this country.

The Upshot

Public defenders can support the Black Lives Matter movement by litigating against racial injustice wherever we find it. We must also educate community members on the vital role that public defenders play as watchdogs of the constitution and protectors of civil rights. It is our obligation to ensure the system is accountable to the public it serves. We must work collectively and collaboratively to improve outcomes for our clients and their families and strategically fight for the eradication of racism in the criminal justice system.

In the Trenches in the Battle Against Bias



At his inauguration, San Francisco Public Defender, Jeff Adachi delivers a challenge to his staff: Litigate against racism in the courts wherever you can.

This month marks 30 years since I started as a San Francisco deputy public defender. I was right out of law school, wet-behind-the-ears, a misdemeanor attorney with a caseload of 300 clients. The Public Defender at that time, Jeff Brown, took a chance on me and hired me.

It was a very different office then, but I learned how to prepare, investigate and try cases from an office with a tradition of fighting. It was a job that was overwhelming and yet the most exciting experiences each day. Every day, I feel truly grateful that I have this job and I am able to work for an agency and a cause that has given me so much.

Over the past 12 years, we have worked to reduce caseloads in order to improve the quality of representation. The caseloads we handled 30 years ago are a thing of the past. We have added paralegals, investigators and social workers to our staff. Our budget has more than doubled during that time. And I'm very proud that we have been recognized nationally and received top awards by the American Bar Association, the National Legal Aid and Defenders Association and the California Public Defenders Association for our work and innovative programs. We have worked to lead the way in the area of prisoner reentry, helping people reclaim their lives. Through our Clean Slate program, we have

helped more than 25,000 people clear their criminal records. Our juvenile justice programs are among the most effective and innovative in the state.

I'd like to think that we've accomplished a lot, but we have so much more to do.

Our system of justice is broken. We know this from what we see every day in the courts, jails and prisons.

In San Francisco, if you are black, you are four times more likely to be stopped for a traffic violation than your white counterpart. You are seven times more likely to be arrested. And if you are brought to court, your bail is likely to be higher than your non-black counterpart. According to a U.S. Sentencing Commission study, black males are subjected to harsher sentences than their white counterparts.

This has resulted in the overcharging and over incarceration of African Americans and Latinos—black and brown people. In San Francisco, where African Americans are less than six percent of the city's population, nearly 60 percent of those in jail are African American. Although black drug users are proportionately the same as white drug users, a black person is four times more likely to be arrested than a white person who uses drugs.

It is even worse for black girls and women.

In San Francisco, black girls under the age of 20 are 50 times more likely to be arrested than their white counterparts. San Francisco, with its relatively small population, accounts for a whopping one-third of all arrests of black girls in the state.

Now there's a great debate. We've have a Bay Area District Attorney say that there is no racism in the courts. But studies have shown that as human beings, we all carry unconscious biases. These biases dictate our decision making, and when we make decisions in the justice system, these biases affect what we do. It can affect who a police officer decides to stop, and who they perceive as a

threat, or how a prosecutor charges a case or offers a plea bargain, or how much bail a judge sets, or how harsh a sentence a judge hands down. These biases also affect how we, as public defenders, do our jobs.

The good news is that this is something we can begin to address. That's why we started a Racial Justice Committee in our office in 2013. We are partnering with the University of Pennsylvania Law School's Quattrone Center, working with scientists and economists to identify the root of bias in decision making. We are raising issues relating to race in bail hearings, and in our cases, so that these issues are not ignored.

As public defenders, we have to fight harder than ever before. It is our job to ensure that the power of the government is not abused, to enforce the Constitution, to expose government and police misconduct and to fight for racial justice.

This is such an exciting time to be a part of this movement for Justice. We must do our part, as public defenders, in addressing racial disparities in our system. We have witnessed what has been happening and is continuing to happen throughout the nations. The deaths of Tamir Rice, Michael Brown, Oscar Grant, John Crawford and Eric Garner must not be in vain.

There is reform in the air. I'm proud that one of the people who started the reform movement of our prison system is here today. Michael Bien is one of my heroes. He and Don Spector and the Prison Law Office took on the California prison system and won. They were responsible for all of the lawsuits that resulted in forcing California to stop over-incarcerating people. And as people are released, it is even more important that we work with our community partners—People like Peter Dwares, who has helped over 15,000 kids prepare for college, Rudy Corpuz, who started United Playaz, an organization right here in San Francisco's Tenderloin neighborhood that helps kids stay gang free.

They say the pen is mightier than the sword. So we have

to take our pens and our computers and use them in our cases to write motions and litigate against racism in our courts.

As Public Defenders, we cannot ignore the impact of racism on what we do, on juries or in other decisions that affect the lives of those who are in the criminal justice system. It is a luxury we cannot afford. And there can be “No Justice, No Peace!” until we can eradicate the racism that is killing and mistreating black and brown people in this country.



THE W. HAYWOOD

BURNS INSTITUTE FOR JUVENILE JUSTICE FAIRNESS & EQUITY



SAN FRANCISCO JUSTICE REINVESTMENT INITIATIVE: RACIAL AND ETHNIC DISPARITIES ANALYSIS FOR THE REENTRY COUNCIL

SUMMARY OF KEY FINDINGS

SUMMARY OF KEY FINDINGS

The W. Haywood Burns Institute (BI) is a national non-profit organization that has worked successfully with local jurisdictions to reduce racial and ethnic disparities in the justice system by leading traditional and non-traditional stakeholders through a data-driven, consensus based process. BI was engaged by the Reentry Council of The City and County of San Francisco to conduct a decision point analysis to learn whether and to what extent racial and ethnic disparities exist at key criminal justice decision making points in San Francisco. The analysis was limited due to data limitations. For additional information regarding the key findings listed in this summary, please see the full report.

DEMOGRAPHIC SHIFTS IN SAN FRANCISCO

- Data indicate that San Francisco's demographic make-up is changing. Between 1994 and 2013, the number of Black adults decreased by 21 percent. At the same time, the number of Latino adults increased by 31 percent.

DISPROPORTIONALITY AT EVERY STAGE

- In 2013, there were a disproportionate number of Black adults represented at every stage of the criminal justice process. While Black adults represent only 6% of the adult population, they represent 40% of people arrested, 44% of people booked in County Jail, and 40% of people convicted.
- When looking at the relative likelihood of system involvement- as opposed to the proportion of Black adults at key decision points – disparities for Black adults remain stark. Black adults are 7.1 times as likely to be arrested, 11 times as likely to be booked into County Jail, and 10.3 times as likely to be convicted of a crime in San Francisco.

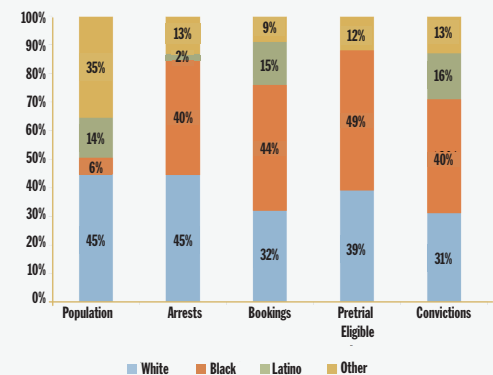
FINDINGS REGARDING DATA CAPACITY

- Data required to answer several key questions regarding racial and ethnic disparities were unavailable. As stakeholders move forward to more fully understand the disparities highlighted in the report, they will need to build capacity for a more comprehensive and system-wide approach to reporting data on racial and ethnic disparities.
- Lack of "ethnicity" data impeded a full analysis of the problem of disparities. Justice system stakeholders must improve their capacity to collect and record data on ethnicity of justice system clients. Lack of data regarding Latino adults' involvement is problematic for obvious reasons – if we do not understand the extent of the problem, we cannot craft the appropriate policy solutions. Additionally, when population data disregard ethnicity, and only focus on race, the vast majority of these "Hispanics" are counted as White. The result is a likely inflated rate of system involvement for White adults¹, and an underestimation of the disparity gap between White and Black adults.

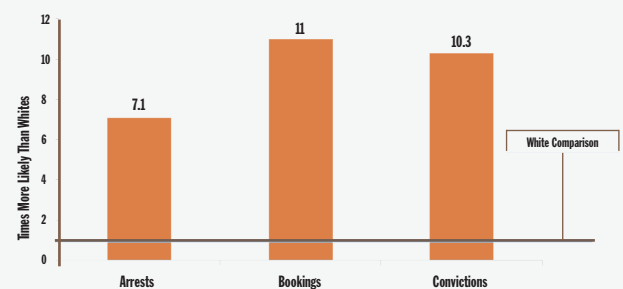
¹ Nationally, when population data disregard ethnicity, and only focus on race, the vast majority of these "Hispanics" (89%) would be identified as "White."). Puzzanchera, C., Sladky, A. and Wang, W. (2014). "Easy Access to Juvenile Populations: 1990-2013." Online. Available: <http://www.ojjdp.gov/ojstatbb/ezapop/>



2013 DATA: SAN FRANCISCO

































2013: DISPARITY GAP FOR BLACK ADULTS AT KEY DECISION POINTS



ARRESTS

- In 2013, Black Adults in San Francisco were more than seven times as likely as White adults to be arrested.
- Despite a significant overall reduction in arrest rates in San Francisco, the disparity gap – the relative rate of arrest for Black adults compared to White adults - is increasing.
- Whereas the disparity gap in arrests statewide is decreasing, the disparity gap in San Francisco is increasing.
- Rates of arrest are higher for Black adults than White adults for every offense category.
- Despite reductions in rates of arrest for drug offenses, the Black/White disparity gap increased for every drug offense category.

DISPARITY GAP FOR ARRESTS (1994 and 2013)			
1994		2013	
White 1		White 1	
Black 4.6	    	Black 7.1	       
For every 1 White adult arrested in San Francisco in 1994, there were 4.6 Black adults arrested. For every 1 White adult arrested in San Francisco in 2013, there were more than 7 Black adults arrested.			

DISPARITY GAP FOR BOOKINGS (2013)	
White 1	
Black 11	          
Latino 1.5	 
API 0.4	
For every 1 White adult booked into San Francisco County Jail, there were 11 Black adults and 1.5 Latino adults booked	

BOOKINGS TO JAIL (PRETRIAL)

- Black adults in San Francisco are 11 times as likely as White adults to be booked into County Jail. This disparity is true for both Black men (11.4 times as likely) and Black Women (10.9 times as likely).
- Latino adults are 1.5 times as likely to be booked as White adults.
- Booking rates for Black and Latino adults have increased over the past three years while booking rates for White adults have decreased.
- The top three residence zip codes of Black adults booked into County Jail were: 94102 (includes the Tenderloin), 94124 (Bayview-Hunters Point), and 94103 (South of Market).
- The top three residence zip codes for Latino adults booked into County Jail were: 94110 (Inner Mission/Bernal Heights), 94102 (includes the Tenderloin), and 94112 (Ingelside-Excelsior/Crocker-Amazon).
- A vast majority (83 percent) of individuals booked into jail in San Francisco had residence zip codes within the County. Overall, only 17 percent of individuals booked into jail had residence zip codes outside of San Francisco.²

PRETRIAL RELEASE

- Booked Black adults are more likely than booked White adults to meet the criteria for pretrial release.³
- Black adults are less likely to be released at all process steps: Black adults are less likely to receive an “other” release (i.e., cited, bailed, and dismissed); less likely than White adults to be released by the duty commissioner; and less likely to be granted pretrial release at arraignment.
- Rates of pretrial releases at arraignment are higher for White adults for almost every quarter.
- Out of all adults who meet the criteria for pretrial release (the entirety of the SFPDP database):
 - 39 percent of Black adults had prior felony(ies) compared to 26 percent of White adults, however, White adults with a prior felony were almost always more likely to be released at arraignment than Black adults with a prior felony;





² Data regarding the homeless population were unavailable. Of the total 19,273 bookings in 2013, there were 3,973 (21%) that did not include a zip code. Some of these missing zip codes may be homeless adults who reside in San Francisco.

³ Data for both Bookings and Pretrial eligible include the most recent year available (Q3 2013-Q2 2014). The data come from two distinct databases. Further analysis is needed to better understand this finding. For example, White adults may be more likely to be cited out and are therefore not included as “eligible” for pretrial release, and protocol for identifying “ethnicity” in the two information systems may not be consistent.

- 44 percent of Black adults had prior misdemeanor(s) compared to 45 percent of White adults, however, White adults with a prior misdemeanor were almost always more likely to be released at arraignment than Black adults with a prior misdemeanor; and
- 62 percent of Black adults had a high school diploma or GED compared to 66 percent of White adults, however, White adults with a HSD/GED were almost always more likely to be released at arraignment than Black adults with a HSD/GED.

CONVICTIONS/SENTENCING

- For every White adult arrested and convicted in 2013, 1.4 Black adults were arrested and convicted.⁴ (Due to lack of data about Latinos at arrest, no comparison of convictions to arrest was made for Latinos).
- Black adults in San Francisco (in the general population) are ten times as likely as White adults in San Francisco (in the general population) to have a conviction in court.
- Latino adults in San Francisco (in the general population) are nearly twice as likely as White adults in San Francisco (in the general population) to have a conviction in court.⁵
- The vast majority of all people convicted are sentenced to Jail/Probation. Black adults with Jail/Probation sentences are more likely to receive formal probation than White adults. Whereas 31 percent of White Adults receive formal probation, 53 percent of Black adults did.
- Black adults are more likely to be sentenced to prison and county jail alone and less likely to be sentenced to Jail/Probation sentence than White adults.
- When they receive Jail/Probation sentences, Black adults are more likely to have a longer County Jail sentence than White adults.
- Although more White adults are convicted on DUI charges with blood alcohol levels greater than or equal to .08 than Black adults, Black and Latino adults convicted of these charges are more likely to have a longer jail sentence (as part of a Jail/Probation sentence) than White adults.⁶
- Of all Black adults convicted, 6 percent were convicted of transporting or selling controlled substances; of all White adults convicted, only 1 percent was convicted of this charge. While the number of adults convicted of transporting or selling controlled substances has decreased substantially over the past 3 years, the proportion is consistently higher for Black adults.⁷
- Black adults convicted of transporting or selling controlled substances are more likely to stay longer in jail as part of a Jail/Probation sentence.
- Over the course of the last year, there were 288,177 bed days as the result of court sentences to jail (either though county jail alone or as a part of a Jail/Probation sentence). Black adults account for 50 percent of these sentenced bed days.

DISPARITY GAP FOR CONVICTIONS (2013)	
White 1	
Black 10.3	
Latino 1.7	
API 0.4	
For every 1 White adult convicted of a crime in San Francisco, there were more than 10 Black adults and nearly 2 Latino adults convicted.	

⁴ When population data disregard ethnicity, the vast majority of Hispanic/Latino people are identified as White. This results in an inflated rate of system involvement for White adults; and subsequently an underestimation of the disparity gaps between White/Black adults & White/Latino adults.

⁵ See note above. It is important to note this for all of the analyses in the conviction/sentencing section which compare White and Latino rates.

⁶ Analysis of specific charges includes the entire timeframe, in order to increase the number of cases analyzed. The criminal code referenced here is VC 23152(b)/M.

⁷ Analysis of specific charges includes the entire timeframe, in order to increase the number of cases analyzed. The criminal code referenced here is HS 11352(a)/F.



THE W. HAYWOOD
BURNS INSTITUTE FOR JUVENILE JUSTICE FAIRNESS & EQUITY

475 14th Street, Suite 800, Oakland, CA 94612

415.321.4100 • 415.321.4140 fax • info@burnsinstitute.org

Talking to Juries about Race

Building Theories & Themes Around Racial Issues at Trial

Which of these three statements do you most agree with?

- Racism still exists as a major problem in society.
- Racism still exists but has gotten better.
- Racism is no longer a problem in society.

- How many have ever had an honest discussion about race with a person of a different race?
- How many of you represent people of a different race regularly?
- Are you competent to represent someone of a different race if you've never broached the topic?

How to Start Talking to Juries About Racial Issues at Trial

- ➔ Identify what the jury pool in your jurisdiction thinks about racism and racial issues.
- ➔ Identify what the racial issues are in your case – both the obvious ones the subtle ones.
- ➔ Begin the first time you talk to a jury – at jury selection.

Which of these three statements would the jurors in your jurisdiction most agree with?

- Racism still exists as a major problem in society.
- Racism still exists but has gotten better.
- Racism is no longer a problem in society.

Fact Pattern

Black Man Accused of Shooting a White Man
Latino Man Accused of Raping a White Woman

Are there any racial undertones?

Fact Pattern

Black Man Accused of Selling Drugs by Police Officers
Latino Man Accused of Drunk Driving by Police Officers

Are there any racial undertones?

Jury Selection

Goals

1. Weed out anyone who can't judge your client fairly.
2. Plant the seed that in some cases, your client's race is part of the reason that they are accused.

How do you do that?

1. Ask for individual voir dire.
2. Ask for juror questionnaires.
3. During your voir dire.

Request For Individual Voir Dire

**Batson v. Kentucky is good for something:
maximizing the case for individual voir dire**

Request For Individual Voir Dire

MOTION OF xxxxx FOR INDIVIDUALIZED VOIR DIRE BY COUNSEL AND INCORPORATED MEMORANDUM

xxxx xxxxxx, by and through undersigned counsel, move the Court for an Order permitting defense and government counsel to voir dire the venire panel individually.

MEMORANDUM IN SUPPORT

Individualized voir dire by counsel is essential so that the defendants can effectively and adequately exercise his peremptory challenges in selecting jurors. In light of *Batson v. Kentucky*, 476 U.S. 79 (1986), and its progeny, including *Georgia v. McCollum*, 112 S.Ct. 2348 (1992), and *J.E.B. v. Alabama ex rel. T.B.*, 114 S.Ct. 1419 (1994), parties (including an accused) cannot exercise their peremptory challenges based on their personal race or gender biases or prejudices.

2. Case law now holds that where there is a prima facie case of racial discrimination in the exercise of a party's peremptory challenges, that party "must articulate a racially neutral explanation for the peremptory challenge." *McCollum*, 112 S.Ct. at 2359; see *Batson*, 476 U.S. at 98. Similarly, if there is a prima facie case of gender discrimination, counsel must offer a gender-neutral, non-pretextual explanation for the peremptory challenge. *J.E.B.*, 114 S.Ct. at 1430. **To enable the accused to exercise his peremptory challenges intelligently and adequately, and to ensure that they can be supported by a race and gender neutral explanation, individualized voir dire is essential.**

Request For Individual Voir Dire

3. The Supreme Court's decision in *J.E.B.* declared:

If conducted properly, voir dire can inform litigants about potential jurors, making reliance upon stereotypical and pejorative notions about a particular gender or race both unnecessary and unwise. Voir dire provides a means of discovering actual or implied bias and a firmer basis upon which the parties may exercise their peremptory challenges intelligently, See, e.g., *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 602 . . . (1976) (Brennan, J., concurring in the judgement) (voir dire "facilitate[s] intelligent exercise or peremptory challenges and [helps] uncover factors that would dictate disqualification for cause"); *United States v. Witt*, 718 F.2d 1494, 1497 (CA10 1983) ("Without an adequate foundation [laid by voir dire], counsel cannot exercise sensitive and intelligent peremptory challenges"). 114 S. Ct. at 1429 (brackets in original). Because, as Justice O'Connor pointed out in her concurring opinion in *J.E.B.*, litigants can no longer simply rely on their intuition in exercising peremptory challenges, 114 S.Ct. at 1432 (O'Connor, J., concurring), fairness dictates that defense counsel be given an opportunity to voir dire the venire panel individually to ensure that a fair and impartial jury is selected consistent with the dictates of *Batson* and its progeny.

CONCLUSION

For the foregoing reasons, the Court should enter an Order permitting defense and government counsel to voir dire the venire panel individually so that the accused can effectively and adequately exercise his peremptory challenges in selecting jurors.

Jury Questionnaires

Prospective jurors may be more likely to reflect honestly and independently when answers are given in writing and individually as versus in the public and intimidating environs of a criminal court. Some sample questions follow. Be sure to leave several lines after each question so as to encourage fuller responses:

RACIAL PREJUDICE: Personal Experience:

A. Free response questions:

Racial prejudice can take many forms. Tell us about your experiences with racial prejudice or where you have felt labeled.

Have you ever felt like you were the target of racial prejudice. Tell us about that situation or experience?

Have you ever had racially prejudiced thoughts about another person, even if those thoughts made you feel uncomfortable or uneasy?

Please tell us about experiences you have had where other people expressed racially prejudice beliefs or opinions?

How do you feel when someone uses a racial slur or tells a racial joke?

What has been your most memorable experience with someone who is African American?

When you are sitting at a stoplight two young Black men approach the crosswalk, do you check to see if your doors are locked? Why do you check?

Jury Questionnaires

Would you do the same thing if two young white men approached the cross walk?

Do you have any friends who are African American? If yes, please tell us about them.

How would you feel if a member of your family wanted to marry someone who was African American?

Have you ever invited someone who is African American to your home?

If your child used a racial slur, what would you tell your child?

Would you be more inclined to believe that a black police officer would be more likely to commit a crime than a white police officer? Why?

Is there any other feeling or opinion you have regarding race that you feel you should share with us?

Jury Questionnaires

B. Multiple choice questions: Circle the answer that you feel is most true:

I would not want my child to marry a (*insert race/ethnicity of client*).

Strongly agree

Agree

Disagree

Strongly Disagree

I have become angry when I hear negative remarks about (*insert race/ethnicity of client*).

Strongly agree

Agree

Disagree

Strongly Disagree

Blacks (*insert race/ethnicity of client*) are less disciplined than whites.

Strongly agree

Agree

Disagree

Strongly Disagree

No respectable white woman would ever have consensual sex with a (*insert race/ethnicity of client*) man.

Strongly agree

Agree

Disagree

Strongly Disagree

Jury Questionnaires

RACIAL PREJUDICE: Beliefs about societal prejudice: Circle the answer that you feel is most true:

Racial prejudice still exists.

Strongly agree

Agree

Disagree

Strongly Disagree

There is more racial prejudice today than there was 30 years ago.

Strongly agree

Agree

Disagree

Strongly Disagree

(Insert race/ethnicity of client) commit more violent crimes per capita than whites.

Strongly agree

Agree

Disagree

Strongly Disagree

Whites who encourage their children not to marry *(insert race/ethnicity of client)* are making a wise choice.

Strongly agree

Agree

Disagree

Strongly Disagree

Whites are being discriminated against due to affirmative action programs.

Strongly agree

Agree

Disagree

Strongly Disagree

(Insert race/ethnicity of client) use more illegal drugs than whites.

Strongly agree

Agree

Disagree

Strongly Disagree

Talking to Jurors About Race

These questions are designed to get jurors to think about how a minority defendant might feel in the courtroom surrounded by people of a different race..

I. Assume that you are on trial – the alleged victim was Black. The judge and the lawyers are all Black. The police officers are all Black. All the jurors who make up your jury are Black and you are the lone white person in the courtroom:

- What are you feeling?**
- Right now as I describe this all Black courtroom in which you are the only white face, what is going through your mind? Tell me about that.**
- Why do you feel this way?**
- Why are you fearful of being the only one who is white in a sea of Black faces?**
- Have you ever been in a situation where you were in the minority racially?**
- Tell me about that. How did that situation make you feel?**

Talking to Jurors About Race

II. Mr./Ms. _____ may be tried by an all white jury (this question takes on additional power if the prosecutor decides to strike a juror of color.)

How do you think/feel that an all white jury may affect the verdict?

Why? (ask several people) – If the lawyer finds that this question is not generating responses from the jury:

A. Try the Pozner/Dodd technique of reversal and ask the following:

"How many people think that the fact that Mr./Ms. _____ may be tried by an all white jury will have no impact on the verdict?"

B. Why do you think this? Tell me more. Who feels otherwise?

C. Or, style the question so the prospective jurors have to choose:

"Some people think an all white jury will have no impact, while others feel it will make it more difficult for my Black client to get a fair trial. What do you think? Why? If the jury does end up being all white, how will you make sure the case is decided only on the evidence?"

Talking to Jurors About Race

These questions are designed to get jurors thinking about how stereotypes may be part of the reason your minority client stands accused.

- I. In the context of your work – who here in their job has never made a mistake of any kind?**

And you who here in the context of work again, has never made an assumption that wasn't true?

Why do you think that happens?

Do it on purpose?

Do you think it is different for police officers?

Do you think that sometimes those assumptions may be based on how someone dresses? How they look? Their race?

Practice Pointers:

- Don't under-estimate how difficult it is for people to talk about race and racism.
- Start with an introductory statement that explains the issue: "We're going to be talking about race and racism. There are no right or wrong answers. We're looking for your biases and it's okay to be biased. Someone might have a bias against chocolate. Everyone has biases. But it's not okay if that bias might affect how you view or decide this case. If you come to court, and you have a bias, it's okay. But if you have a bias against, saying my client, Mr/Ms XXXX, then you can't sit on this particular jury because that wouldn't be fair."
- Jurors may feel uncomfortable if you ask them about how other people feel or react to racism and are more comfortable talking about their feelings and attitudes; don't be afraid to be direct, since the issue is very much out there in the world.
- The goal is to get the jurors talking; you should be talking only 20% of the time and the jurors should be talking 80% of the time. You are like the conductor leading the orchestra and it should be a conversation, not a lecture! If the jurors are talking to each other and reacting and responding to each other, you know you are successfully leading the discussion!

False accusation

Have you ever been accused of something that was false?

What happened?

How did it turn out?

Have you ever been falsely accused of at work? By friends?

What happened.

Prejudging people

Who here has been unfairly judged by another person or people?

Accused of something you weren't responsible for?

Experience jurors have had with racism

Do you think racism is a problem in San Francisco?

What experience have you had with racism?

Seeing it? Reading about it? A friend?

How many black friends do you have?

Talk about other forms of racism?

What kind of experiences have you had that were discriminated against?

How many of your friends have been discriminated against?

What kind of people do you consider racist?

What do you think makes them racist?

Unconscious bias

What do you think unconscious race bias means? (If they don't know what implicit or unconscious bias is, be ready to define it)

How can you identify unconscious race bias?

Do you know why people feel this way?

Is it based on stereotypes? The media?

Why do you think people have a bias against a certain race?

Is it cultural?

Who is racist

Can you think of a public figure who you consider racist?

Would you consider Donald Trump a racist?

What are the things that he's done or said that would lead you to believe he is racist?

Why do you think people will vote for him?

Multi-cultural racism

What are the other ways we discriminate against people in this society?

What are your feelings about a panel of jurors of being white and Asian judging a case about a black man?

Does it make a difference who is on the jury?

You have probably heard that a black person can identify when other people are afraid of them when they are walking on the street and people move away. Have you ever had that experience?

What kind of discrimination have you experienced being an _____
(mention a stereotype – for an Asian “being good at math”)

What kind of experience have you had being prejudged because you are Asian and what those expectations are?

What kind of experiences have you had being prejudged as white?

How can a white person really understand what it’s like to be black?

What are the reasons that you think Asian people are prejudged against blacks?

I know there’s a lot of prejudice against blacks in the Asian community? Why do you think that is? One stereotype about Asians is that they can’t drive. Where does that come from?

Harassment – Facts related to case

How have you been harassed in the past with no reason?

If someone came on the train and said “It stinks in here” would you think it was you? (we want vulnerable jurors)

Attitudes toward police

(Authority) What would you do if a police officer came up to and asked you to “stop filming an arrest”?

Do you think police officers lie?

What are your experiences?

There was a time when everyone believed police were honest.

What do you think has happened since then?

When is a cop doing his duty vs. abusing his authority?

What kind of problems have you ever had with the law?

How many of you are familiar with the [Mario Woods or insert a case involving the shooting of an unarmed person) case?

Ask: What do you know about that case, how do you feel about that case?

How many of you had a good experience with law enforcement?

Have many of you like cops?

How many have friends or family member who are cops?

What are the biggest problems they have as law enforcement?

What do they complain about?

What's the hardest part about being a cop?

What do you see as the biggest problems for them?

Vulnerability

This is a case when Andrea was two months pregnant. She got pulled down to the floor?

What kind of experiences have you or your friends have had being physically harassed when you or they were in a vulnerable situation, such as being pregnant?

Police Harassment by Minorities

When you hear that black people complaining about police harassment do you think that it is real or not?

Do you believe it when blacks complain that law enforcement unfairly targets them?

Experiences with BART police

What experiences have you had with BART police?

How safe do you feel riding the BART system?

How would you compare a BART cop with a SF cop?

Thinkers v. Doers

There are thinkers and doers. Thinkers like to plan and doers like to do. What does that mean to you?

Exposure to BART police incident

How many of you are familiar with the Oscar Grant case?

How many of you thought that the police acted reasonably?

How many of you have seen “Fruitvale Station” the bio-pic movie about Oscar Grant?

Experiences with police shootings

How many of you are familiar with stories of young black men who have been killed by police in this country?

Let’s take one example.

How many of you are familiar with the case of Mario Woods? A young man who was waving a knife and was surrounded by 11 officers and shot to death last December?

How many have seen the video?

What are your thoughts about the behavior of police in that case?

How many of you thought the police acted reasonably?

How many of you thought the police acted unreasonably?

A New Approach to Voir Dire on Racial Bias

Cynthia Lee*

Introduction 843

I. Voir Dire..... 847

 A. The Process of Voir Dire..... 848

 B. The Supreme Court’s Jurisprudence on Voir Dire into Racial
 Bias..... 852

II. Social Science Research on Race Salience 860

 A. Implicit Bias..... 860

 B. Race Salience..... 861

III. Social Science Research on Racial Perceptions of Crime and Support for
 Punitive Criminal Justice Policies..... 863

IV. Combating Implicit Racial Bias in the Criminal Courtroom..... 866

 A. Raising Awareness of Implicit Bias Through Jury Orientation
 Materials..... 866

 B. Raising Awareness of Implicit Bias Through Voir Dire..... 867

 C. Possible Objections..... 869

Conclusion..... 872

INTRODUCTION

The shooting of Michael Brown in Ferguson, Missouri on August 9, 2014 renewed debate over whether racial stereotypes about Black men as dangerous, violent criminals encourage police officers and armed civilians to shoot unarmed Black men in cases where they would not have used deadly force had the victim been White.¹ Two diametrically opposed accounts of what happened emerged in

* Cynthia Lee is the Charles Kennedy Poe Research Professor of Law at The George Washington University Law School. She is the author of *Murder and the Reasonable Man: Passion and Fear in the Criminal Courtroom* (2003) and coauthor (with Angela Harris) of *Criminal Law: Cases and Materials* (3d ed. 2014). She thanks Nancy Kim, Anna Roberts, and Tania Tetlow for helpful comments on this Article. She thanks Lesliediana Jones, Lam Nguyen, and Matthew Halldorson for excellent research assistance on this Article. She thanks Micah Morris of the *UC Irvine Law Review* for excellent editorial assistance on this Article. She also thanks Elizabeth Moulton for administrative assistance on this Article.

1. I purposely capitalize the letter “B” in “Black” and “W” in “White” to acknowledge the fact

the weeks following the shooting. Brown's friend, Dorian Johnson, who was with Brown at the time Brown was shot, claimed Officer Darren Wilson shot Brown for no reason and continued shooting even after Brown turned around with his hands in the air, trying to show the officer that he was unarmed.² In contrast, Officer Wilson said he shot Brown in self-defense after a scuffle in which Brown shoved him into his patrol car and attempted to grab his weapon.³

Polls taken shortly after the shooting showed a racial divide in public opinion over whether the officer was justified in shooting Brown with fifty-seven percent of Blacks saying they believed the shooting was unjustified and only eighteen percent of Whites with the same opinion.⁴ When protests erupted in Ferguson, Missouri over the shooting, the police responded with an unusually heavy-handed display of force.⁵ Again, public opinion was split over whether the protesters or the police acted inappropriately.⁶

One question that prosecutors face in highly charged cases with racial overtones like the Ferguson case is whether to attempt to conduct voir dire into

that Black and White are socially constructed racial categories. See IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 9–10 (1996).

2. Elliott C. McLaughlin, *What We Know About Michael Brown's Shooting*, CNN (Aug. 15, 2014, 12:10 AM), <http://www.cnn.com/2014/08/11/us/missouri-ferguson-michael-brown-what-we-know> [<http://perma.cc/SK6Y-YMZ8>].

3. Julia Talanova, *Support Grows for Darren Wilson, Officer Who Shot Ferguson Teen Michael Brown*, CNN (Sept. 8, 2014, 7:11 AM), <http://www.cnn.com/2014/08/19/us/ferguson-darren-wilson-support> [<http://perma.cc/72HL-H5MH>]; see also Julie Bosman et al., *Amid Conflicting Accounts, Trusting the Officer*, N.Y. TIMES, Nov. 26, 2014, at A1 (reporting that Officer Wilson told the grand jury that Michael Brown reached into his police vehicle and fought him for his gun). An investigation into the shooting by the U.S. Department of Justice found that the physical and forensic evidence supported Officer Wilson's claim of self-defense and that the officer shot Brown as Brown was moving toward the officer. See U.S. DEP'T OF JUSTICE, *REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON* 5–8 (2015).

4. *Reactions to the Shooting in Ferguson, Mo., Have Sharp Racial Divides*, N.Y. TIMES (Aug. 21, 2014), <http://www.nytimes.com/interactive/2014/08/21/us/ferguson-poll.html>. The reaction of many African Americans to the shooting likely reflected their distrust of police given a long history of antagonistic police-citizen interactions in Ferguson, Missouri. After a five-month long investigation, from September 4, 2014 to March 4, 2015, the Department of Justice found significant evidence of racial bias, both implicit and explicit, in the Ferguson Police Department and criminal justice system. U.S. DEP'T OF JUSTICE, *INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT* 62–63, 70–78 (2015).

5. Joe Coscarelli, *Why Cops in Ferguson Look Like Soldiers: The Insane Militarization of America's Police*, N.Y. MAG. (Aug. 14, 2014, 12:29 PM), <http://nymag.com/daily/intelligencer/2014/08/insane-militarization-police-ferguson.html> [<http://perma.cc/NS5P-JPPC>] (noting that the law-enforcement response to civilian protests against Michael Brown's death involved tear gas, flash grenades, and military-style rifles).

6. A YouGov poll found that forty-eight percent of Whites believed the protests were unreasonable compared to thirty-one percent of Blacks. Peter Moore, *Ferguson, MO.: Racial and Political Divide over Brown Shooting*, YOUTOV (Aug. 18, 2014, 8:01 AM), <http://today.yougov.com/news/2014/08/18/ferguson-mo> [<http://perma.cc/N2SZ-GFBI>] (referring to poll results at http://cdn.yougov.com/cumulus_uploads/document/ou4yi1g0z8/tabs_HP_police_20140817-2.pdf). The same poll found thirty-four percent of Whites believed the police response to the Ferguson protests to be reasonable compared to only sixteen percent of Blacks with the same opinion. *Id.*

racial bias.⁷ Voir dire is the process of questioning prospective jurors to ensure that those chosen to sit on the jury will be impartial and unbiased. As Neil Vidmar and Valerie Hans explain, “[v]oir dire, a term with a French origin meaning roughly ‘to see them say,’ is used to denote the process whereby prospective jurors are questioned about their biases during the jury selection process”⁸ In federal court, voir dire is generally conducted by the trial judge.⁹ In state court, voir dire practice varies widely depending on the jurisdiction. In most states, voir dire is conducted by both the judge and the attorneys.¹⁰

7. In the Ferguson case, since the grand jury convened by prosecutor Robert McCulloch declined to indict Officer Wilson in November 2014, prosecutors did not need to answer this question. Taylor Wofford, *After Grand Jury Decides Not to Charge Darren Wilson, What's Next for Ferguson?*, NEWSWEEK (Nov. 24, 2014, 9:35 PM), <http://www.newsweek.com/no-charges-ferguson-michael-brown-shooting-case-285976> [<http://perma.cc/6TNQ-N4MT>]. Many thought McCulloch should have let someone else handle the case because of McCulloch's strong ties to law enforcement and the fact that his father was a police officer who was killed by a Black man when McCulloch was only twelve years old. See Pema Levy, *Ferguson Prosecutor Robert P. McCulloch's Long History of Siding with the Police*, NEWSWEEK (Aug. 29, 2014, 6:33 AM), <http://www.newsweek.com/ferguson-prosecutor-robert-p-mccullochs-long-history-siding-police-267357> [<http://perma.cc/ZU9A-QP9S>] (“[McCulloch's] father was a St. Louis policeman killed in the line of duty by a Black man when McCulloch was 12. [McCulloch's] brother, nephew and cousin all served with the St. Louis police [department]”); see also Leigh Ann Caldwell, *Concerns Arise About Prosecutor in Michael Brown Case*, CNN (Aug. 20, 2014, 12:48 PM), <http://www.cnn.com/2014/08/19/us/ferguson-prosecutor-mcculloch> [<http://perma.cc/6PSH-SEXY>]. After it came to light that McCulloch knew some of the witnesses he presented to the grand jury were lying, the NAACP Legal Defense Fund asked a Missouri judge to reconvene a new grand jury panel to reconsider the case. Christopher Harress, *NAACP Calls for New Ferguson Grand Jury Citing Multiple Concerns with November Decision*, INT'L BUS. TIMES (Jan. 6, 2015, 7:25 PM), <http://www.ibtimes.com/naacp-calls-new-ferguson-grand-jury-citing-multiple-concerns-november-decision-1775386> [<http://perma.cc/Z5RD-2G2E>]. The judge denied the NAACP's request to convene a new grand jury. Associated Press, *Judge Rejects Request for New Ferguson Grand Jury*, WASH. TIMES (Jan. 21, 2015), <http://www.washingtontimes.com/news/2015/jan/21/judge-rejects-request-for-new-ferguson-grand-jury/>.

8. NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES: THE VERDICT* 87 (2007).

9. Tamara F. Lawson, *Before the Verdict and Beyond the Verdict: The CSI Infection Within Modern Criminal Jury Trials*, 41 LOY. U. CHI. L.J. 119, 145 (2009) (noting that in the federal system, judges ask most of the questions during voir dire, whereas in the state system, judges allow attorneys to ask most questions).

10. Maureen A. Howard, *Taking the High Road: Why Prosecutors Should Voluntarily Waive Peremptory Challenges*, 23 GEO. J. LEGAL ETHICS 369, 378–79 n.44 (2010) (citing Valerie P. Hans & Alayna Jehle, *Avoiding Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 CHI.-KENT L. REV. 1179, 1184 (2003)) (noting that in forty-three states, voir dire questioning is conducted by both the judge and attorneys); David B. Rottman et al., U.S. DEP'T OF JUSTICE, *State Court Organization 1998*, at 273–77 tbl.41 (2000), <http://www.bjs.gov/content/pub/pdf/sco98.pdf> [<http://perma.cc/2SMK-7ETA>] (listing four states—Connecticut, North Carolina, Texas, and Wyoming—in which attorneys only conduct voir dire, listing seven states—Arizona, California, Delaware, Illinois, Massachusetts, New Hampshire, and New Jersey—in which judges only conduct voir dire, and noting that both attorneys and judges conduct voir dire in the remaining states). In Missouri, judges usually allow the attorneys to ask the questions during jury selection, but the judge may, at her discretion, conduct some or all of the voir dire herself. Your Missouri Courts, TRIAL JUDGES CRIMINAL BENCHBOOK §§ 7.8–9 (Kelly Broniec et al. eds., 2007), http://www.courts.mo.gov/hosted/resourcecenter/TJCB%20Published%20April%202011/TJBB.htm#CH_07_JurySelect_2d_files/CH_07_JurySelect_2d.htm (noting that voir dire is done first by the counsel for the state and then by the counsel for the defendant (§ 7.8), but also noting that in some instances—at the court's

It is important to note that racial bias is not unique to any particular group. While it is often assumed that racial bias means bias in favor of Whites and against Blacks, racial bias can cut in many different ways. In the Ferguson case, for example, those who believed Michael Brown was shot when he had his hands up before the Department of Justice's investigation into the shooting was completed¹¹ may have assumed Officer Wilson was lying when he claimed self-defense because of stereotypes about White police officers as racist individuals. At the same time, those who believed the officer's account of what happened before knowing all of the facts relating to the shooting may have assumed Michael Brown was acting in a threatening way because of stereotypes about Black men.

The Supreme Court has addressed the question of voir dire into racial bias in only a handful of cases. All of these cases dealt with the issue of whether a criminal defendant has the right to have prospective jurors questioned on racial bias, and the last time the Court dealt with this issue was in 1986, more than twenty-five years ago.

Reasonable minds can disagree as to whether it is good trial strategy to voir dire prospective jurors on racial bias. Perhaps the most common view is that reflected by Albert Alschuler, who suggested over twenty-five years ago that voir dire into racial bias would be "minimally useful."¹² Alschuler argued that asking a prospective juror whether he would be prejudiced against the defendant because of the defendant's race would be patronizing and offensive.¹³ He also argued that no prospective juror would admit to racial bias, even if he was in fact prejudiced against members of a particular racial group.¹⁴

In this Article, I rely on empirical research on implicit bias to challenge Alschuler's view that voir dire into racial bias would be of minimal benefit to an attorney concerned about such bias. This research suggests that for an attorney concerned that racial stereotypes about the defendant, the victim, or a witness might affect how the jury interprets the evidence, voir dire into racial bias can be extremely helpful. Calling attention to implicit racial bias can encourage jurors to view the evidence without the usual preconceptions and automatic associations involving race that most of us make. While I agree with Alschuler that a simple, close-ended question like, "Are you going to be biased against the defendant because of his race?" is unlikely to be helpful, I believe that a series of open-ended questions

discretion—the judge can conduct some or all of the voir dire by herself (§ 7.9)); Michael L. Matula & G. Nicole Hininger, *The Law of Jury Selection in Missouri State Courts*, 66 J. Mo. BAR 136 (2010), <https://www.mobar.org/uploadedFiles/Home/Publications/Journal/2010/05-06/The%20Law%20of%20Jury%20Selection%20in%20Missouri%20State%20Courts.pdf> (noting that all parties have the opportunity to question jurors to expose juror bias or prejudice).

11. See U.S. DEP'T OF JUSTICE, *supra* note 3, at 5–8 (2015) (finding that the physical and forensic evidence supported Officer Wilson's claim of self-defense).

12. Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 160 (1989).

13. *Id.* at 161.

14. *Id.* at 160 ("One doubts that Lester Maddox, Orville Faubus, George Wallace, Theodore Bilbo or anyone else would have responded to the proposed question by confessing a bias . . .").

educating jurors about implicit bias and encouraging them to reflect upon whether and how implicit racial bias might affect their ability to even-handedly consider the evidence can be beneficial in helping to ensure a truly impartial jury.

My Article proceeds in four parts. In Part I, I provide an overview of the process of voir dire and review the Supreme Court's jurisprudence on voir dire into racial bias. In Part II, I examine social science research that helps answer the question whether it is a good idea to conduct voir dire into racial bias. Some of this research relates to the Implicit Association Test (IAT), an online test that measures implicit bias by comparing response times to selected words and images. Additionally, however, a wealth of less familiar empirical research on race salience conducted over the past decade indicates that calling attention to race can motivate jurors to treat Black and White defendants equally, whereas not highlighting race may result in jurors tending to be more punitive and less empathetic towards Black defendants than they might otherwise be without such attention.

In Part III, I examine a few recent studies calling into question whether making race salient is a good idea. These studies indicate that when White individuals perceive extreme racial differences in the prison population (i.e., when they believe there are many more Blacks and Latinos than Whites in prison), they are more likely to support punitive criminal justice policies than when they perceive that the proportion of minorities in prison is not so large. I analyze these studies and conclude that, while they may appear at first glance to contradict the race salience research, they do not in fact undermine that research.

In Part IV, I turn to the question of what steps can be taken to combat implicit racial bias in the criminal courtroom. I argue that in light of the social science research on implicit bias and race salience, it is best for an attorney concerned about racial bias to confront the issue of race head on during jury selection. Voir dire can be used to both educate prospective jurors about the concept of implicit bias and help them to become aware of their own implicit biases. It makes sense to address the possibility of implicit racial bias early on, rather than waiting until just before the jury deliberates, as it may be too late by then to undo its effects.

I. VOIR DIRE

It is often said that a trial is won or lost when the jury is selected.¹⁵ This is because "jurors bring to the courtroom biases and predispositions which largely determine the outcome of the case."¹⁶ The process of voir dire presents an opportunity for the attorneys to influence who ends up sitting on the jury, at least in jurisdictions where attorney voir dire is permitted.

In this Part, I first discuss the process of voir dire and its role in jury selection.

15. Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1557, 1590 n.223 (2013).

16. Margaret Covington, *Jury Selection: Innovative Approaches to Both Civil and Criminal Litigation*, 16 ST. MARY'S L.J. 575, 576 (1985).

I also examine the benefits of attorney voir dire over judge-dominated voir dire. I then discuss the Supreme Court's jurisprudence on voir dire into racial bias.

A. *The Process of Voir Dire*

"Voir dire is the process of questioning prospective jurors about their qualifications to serve on the jury panel to decide the case."¹⁷ In federal court, voir dire is usually conducted by the judge.¹⁸ In state court, jury selection procedures vary widely with judge-dominated voir dire the practice in seven states, attorney-dominated voir dire the practice in four states, and a mix of judge and attorney questions in the remaining state courts.¹⁹ Some courts allow the attorneys to propose questions that are then given to prospective jurors in the form of a written questionnaire.²⁰

According to one source, jury selection in felony cases takes an average of 3.6 to 3.8 hours.²¹ During the process of jury selection, the parties are given the opportunity to strike an unlimited number of prospective jurors for cause. A "for cause" challenge will be granted if the judge finds that the party has articulated a good reason that the juror should not serve, such as an inability to be impartial or a prior relationship with the defendant, the defense attorney, the prosecutor, the judge, or one of the witnesses.²² Each side is also given a set number of peremptory challenges,²³ which can be used to strike a prospective juror for any reason or no reason at all, as long as the reason for striking the prospective juror is not based on the individual's race or gender.²⁴

In order to guard against the possibility that attorneys may use their peremptory challenges to strike prospective jurors based on their race, the Court in *Batson v. Kentucky*²⁵ established a three-part framework much like the three-part framework used in the Title VII context to determine whether an individual has

17. Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 158 (2010).

18. Lawson, *supra* note 9, at 145.

19. Rottman et al., *supra* note 10, at 273–77.

20. Roxanne Barton Conlin & Gretchen Jensen, *What, Me? Prejudiced? Absolutely Not!*, TRIAL, Dec. 2000, at 20, 22.

21. Collin P. Wedel, Note, *Twelve Angry (and Stereotyped) Jurors: How Courts Can Use Scientific Jury Selection to End Discriminatory Peremptory Challenges*, 7 STAN. J. C.R. & C.L. 293, 315 (2011).

22. VIDMAR & HANS, *supra* note 8, at 87 ("A 'challenge for cause' is an assertion by one of the lawyers that a potential juror is not impartial.").

23. For example, in federal court, a defendant charged with a felony is given ten peremptory challenges, and the prosecutor is given six peremptory challenges. FED. R. CRIM. P. 24(b)(2). If the defendant is in federal court and charged with a misdemeanor, both the defendant and the prosecutor are given three peremptory challenges. (b)(3). In a federal capital case, both sides get twenty peremptory challenges. (b)(1).

24. *J.E.B. v. Alabama*, 511 U.S. 127 (1994) (forbidding peremptory challenges based on gender); *Batson v. Kentucky*, 476 U.S. 79 (1986) (prohibiting peremptory challenges based on race).

25. *Batson*, 476 U.S. at 79.

been denied a job on the basis of unlawful discrimination.²⁶ Under the *Batson* framework, if one party believes the other party has used a peremptory strike to remove a juror because of the juror's race, that party may assert a *Batson* challenge.²⁷ The challenger must first set forth a prima facie case of intentional discrimination.²⁸ Under the original *Batson* framework, a defendant who asserted a *Batson* challenge could establish a prima facie case of purposeful discrimination in the selection of the jury by showing "that he [was] a member of a cognizable racial group . . . , and that the prosecutor [had] exercised peremptory challenges to remove from the venire members of the defendant's race."²⁹ Once the defendant showed that these facts and any other relevant circumstances raised an inference that the opposing party used its peremptory challenges to exclude individuals from the jury on account of their race,³⁰ the burden shifted to the opposing party to proffer a race-neutral reason for the strike.³¹ After a race-neutral reason was proffered by the party opposing the *Batson* challenge, the trial court had to decide whether the challenger has met its burden of proving purposeful discrimination.³² In *J.E.B. v. Alabama*, the Court extended *Batson* to forbid peremptory challenges based on gender.³³ At least one lower court has gone further, applying *Batson* to peremptory challenges based on sexual orientation.³⁴

26. Under the three-part framework established by the Court in *McDonnell Douglas Corp. v. Green*, the employee must first establish a prima facie case of unlawful discrimination by a preponderance of the evidence. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). The employee can establish a prima facie case by showing (1) he belongs to a racial minority; (2) he applied and was qualified for a job the employer was trying to fill; (3) though qualified, he was rejected; and (4) thereafter the employer continued to seek applicants with complainant's qualifications. *Id.* Once the employee establishes a prima facie case, the burden shifts to the employer to rebut this prima facie case by articulating a legitimate, nondiscriminatory reason for the employee's rejection. *Id.* The employee can prevail only if he can show that the employer's response is merely a pretext for behavior actually motivated by discrimination. *Id.* at 798.

27. Because *Batson* involved a defendant's challenge to a prosecutor's peremptory challenge, its holding left open the question whether a prosecutor could assert a challenge against a defendant if he believed the defendant was exercising its peremptory challenges in a racially discriminatory manner. In 1992, the Court answered this question in the affirmative, applying *Batson* to criminal defendants. *Georgia v. McCollum*, 505 U.S. 42, 46–48 (1992); *see also* *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 618–19 (1991) (extending *Batson* to civil litigants).

28. *Batson*, 476 U.S. at 96.

29. *Id.* Subsequently, the Court broadened the *Batson* framework to include challenges based on ethnicity, *see* *Hernandez v. New York*, 500 U.S. 352 (1991), and later gender, *see* *J.E.B. v. Alabama*, 511 U.S. 127 (1994).

30. *Id.*

31. *Id.* at 97. The Court, however, has made it fairly easy for the opposing party to rebut the challenge, finding it is not necessary that the opposing party's race-neutral explanation be minimally persuasive or even plausible at stage two of the *Batson* inquiry. *Purkett v. Elem*, 514 U.S. 765, 768 (1995) ("The Court of Appeals erred by . . . requiring that the justification tendered at the second step be not just neutral but also at least minimally persuasive, i.e., a 'plausible' basis for believing that 'the person's ability to perform his or her duties as a juror' will be affected.").

32. *Batson*, 476 U.S. at 98.

33. *J.E.B. v. Alabama*, 511 U.S. 127 (1994).

34. *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 476 (9th Cir. 2014).

While *Batson* was well intended, it has not proven to be very effective.³⁵ Attorneys facing *Batson* challenges have been able to survive these challenges by proffering fairly implausible “race-neutral” reasons for their strikes. For example, in one case, a prosecutor who faced a *Batson* challenge from a Black defendant charged with importing heroin proffered two ostensibly race-neutral reasons for striking a Black woman from the jury.³⁶ First, the prosecutor noted that the prospective juror was a postal employee and said that it was the U.S. Attorney’s Office’s general policy not to have postal employees on the jury.³⁷ When pressed by the defense attorney, the prosecutor backed down and admitted that the office did not have such a policy and proffered a second reason for the strike.³⁸ The prosecutor then suggested that because the prospective juror was a single parent who rented an apartment in an urban area, she “may be involved in a drug situation where she lives.”³⁹ The judge accepted this second explanation as a race-neutral reason for the strike and denied the defense’s *Batson* objection.⁴⁰

In another case, the government used five of its six peremptory challenges to strike Black jurors.⁴¹ When the defendant, a Black man, asserted a *Batson* challenge, one of the race-neutral reasons proffered by the government for striking a Black female from the jury was that her name, Granderson, closely resembled that of a defendant, Anthony Grandison, in a previous case tried by the same prosecutor.⁴² Even though that case was completely unrelated to the case at hand and therefore the fact that the prospective juror’s name was similar to the name of a defendant in a completely unrelated case would have had no bearing on the prospective juror’s ability to be fair and impartial, the Court of Appeals agreed with the trial court that this was a neutral and nonpretextual reason for the strike and affirmed the defendant’s conviction.⁴³

In *United States v. Romero-Reyna*, the defendant, a Hispanic man charged with possession of marijuana and heroin with intent to distribute, challenged the government’s use of its peremptory challenges against six prospective jurors of Hispanic origin.⁴⁴ The prosecutor proffered as a race-neutral reason for striking one of the individuals who worked as a pipeline operator that he had a “P” rule in which

35. Professor Jean Montoya surveyed prosecutors and criminal defense attorneys and found that most thought *Batson* was of limited effectiveness in eliminating racial discrimination in jury selection in large part because of the ease with which an attorney can come up with a race-neutral reason for the strike. Jean Montoya, *The Future of the Post-Batson Peremptory Challenge: Voir Dire by Questionnaire and the “Blind” Peremptory*, 29 U. MICH. J.L. REFORM 981, 1006 (1996).

36. *United States v. Uwaezhoke*, 995 F.2d 388 (3d Cir. 1993).

37. *Id.* at 390–91.

38. *Id.* at 391.

39. *Id.*

40. *Id.*

41. *United States v. Tindle*, 860 F.2d 125, 128 (4th Cir. 1988).

42. *Id.* at 129.

43. *Id.*

44. *United States v. Romero-Reyna*, 889 F.2d 559, 560 (5th Cir. 1989).

he never accepted jurors whose occupations began with a “P.”⁴⁵ The trial court accepted this explanation as nonpretextual and rejected the defendant’s *Batson* challenge.⁴⁶ On remand, the prosecutor repeated adherence to his “P” rule, but added that he had been informed that marijuana use by pipeline operators was prevalent.⁴⁷ This time, the trial court rejected the prosecutor’s “P” rule as a legitimate basis for the strike, noting that several other members of the venire had occupations beginning with the letter “P” and had not been struck by the prosecutor.⁴⁸ Nonetheless, the trial court found that the newly added explanation was race-neutral and not a pretextual reason for the strike and rejected the defendant’s *Batson* challenge again.⁴⁹

Another problem is that the attorney exercising the challenged strike may not even be aware that she would not have struck the prospective juror if that individual had been of another race. As Antony Page explains, an attorney may be unaware that she has relied on racial stereotypes in forming her opinions about the prospective juror.⁵⁰ When asked to provide a race-neutral reason for the strike, the attorney may sincerely believe that she struck the prospective juror for reasons not related to the juror’s race, even though implicit racial bias may have in fact influenced the attorney’s perceptions of the individual.⁵¹ “By the time the lawyer exercises the peremptory challenge, stereotypes may have thoroughly affected her observation and interpretation of the information upon which she makes her decision.”⁵² In light of these and other problems with the *Batson* framework, critics of *Batson* have argued that it would be best to simply eliminate the peremptory challenge altogether and force attorneys to take the first twelve individuals in the jury box unless the attorneys can articulate reasons to challenge those individuals for cause.⁵³

Regardless of whether peremptory challenges continue to exist in our criminal justice system, a critical question remains: which legal actor—the judge or the attorney—should conduct voir dire? Empirical research suggests that judge-dominated voir dire is less effective at discovering juror bias than attorney voir dire because prospective jurors often give what they think is the socially desirable

45. *Id.*

46. *Id.*

47. *Id.* at 561.

48. *Id.*

49. *Id.*

50. Antony Page, *Batson’s Blind Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 228 (2005).

51. *Id.*

52. *Id.*

53. See Raymond J. Broderick, *Why the Peremptory Challenge Should be Abolished*, 65 TEMP. L. REV. 369, 420–23 (1992); Theodore McMillian & Christopher J. Petrini, *Batson v. Kentucky: A Promise Unfulfilled*, 58 UMKC L. REV. 361, 374 (1990); see also *Batson v. Kentucky*, 476 U.S. 79, 103 (1986) (Marshall, J., concurring) (opining that the only way to stop the discriminatory use of the peremptory challenge is to completely abolish peremptory challenges).

response when the judge is asking the questions.⁵⁴ There are other reasons why a trial court should allow the attorneys to conduct voir dire, particularly when the case involves the possibility of racial bias. As Judge Mark Bennett notes, attorneys usually know the case better than the trial judge, and therefore “are in the best position to determine how explicit and implicit biases among potential jurors might affect the outcome.”⁵⁵ Attorneys also have more of an incentive than the trial judge to use jury consultants and other resources “to develop voir dire strategies to address both explicit and implicit biases of prospective jurors.”⁵⁶ This is because attorneys need as much information as possible about the prospective jurors in order to know which prospective jurors would have difficulty being impartial and should be stricken from the jury.⁵⁷

B. *The Supreme Court’s Jurisprudence on Voir Dire into Racial Bias*

The U.S. Supreme Court has addressed the question of whether a criminal defendant has a right to question prospective jurors on the issue of racial bias in only a handful of cases. Not surprisingly, the Court has gone back and forth on this issue.

Initially, the Court was sympathetic to the idea that a criminal defendant has a constitutional right to question prospective jurors about racial bias. In 1931, the Court reversed a Black defendant’s murder conviction where the trial judge had refused a defense request to interrogate the venire on racial prejudice.⁵⁸ In *Aldridge v. United States*, a Black man charged with the murder of a White police officer was convicted of first-degree murder and sentenced to death.⁵⁹ The trial judge had refused a defense request to question prospective jurors on whether they had any racial prejudice based on the fact that the defendant was Black and the deceased was White.⁶⁰ The Supreme Court reversed the conviction, stating that fairness demands that inquiries into racial prejudice be allowed.⁶¹ In response to the lower court’s suggestion that such inquiry was unnecessary since African Americans were afforded the same rights and privileges as Whites, such as the right to practice law and the right to serve on juries,⁶² the Court said, “Despite the privileges accorded to the negro, we do not think that it can be said that the possibility of such prejudice

54. See Bennett, *supra* note 17, at 160; Susan E. Jones, *Judge- Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor*, 11 LAW & HUM. BEHAV. 131, 143 (1987) (finding that prospective jurors respond more candidly and are less likely to give what they think is the socially desirable response when attorneys are asking the questions during voir dire than when the judge is asking questions).

55. Bennett, *supra* note 17, at 160.

56. *Id.*

57. J.E.B. v. Alabama, 511 U.S. 127, 154 (1994) (Kennedy, J., concurring) (“[P]reventing bias . . . lies at the very heart of the jury system.” (citations omitted)).

58. *Aldridge v. United States*, 283 U.S. 308 (1931).

59. *Id.* at 309.

60. *Id.* at 310–11.

61. *Id.* at 313.

62. *Id.* at 316 (McReynolds, J., dissenting).

is so remote as to justify the risk in forbidding the inquiry.”⁶³ Noting “[t]he argument is advanced on behalf of the government that it would be detrimental to the administration of the law in the courts of the United States to allow questions to jurors as to racial or religious prejudices,”⁶⁴ the *Aldridge* Court concluded, “We think that it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred.”⁶⁵

The Court did not revisit the question of whether a criminal defendant has a right to require the trial judge to question prospective jurors on racial bias until 1973, more than forty years later. In *Ham v. South Carolina*, a case involving a Black civil rights activist charged with possession of marijuana, the Court again sided with the defendant, holding that a trial judge’s refusal to question prospective jurors as to possible racial prejudice violated the defendant’s constitutional rights.⁶⁶ This time, the Court went further than it had in *Aldridge v. United States* and expressly grounded its decision in due process, holding that “the Due Process Clause of the Fourteenth Amendment requires that . . . the [defendant] be permitted to have the jurors interrogated on the issue of racial bias.”⁶⁷ The *Ham* Court reaffirmed the trial court’s discretion to conduct voir dire in the manner it thinks is best, noting that the trial judge is “not required to put the question in any particular form, or to ask any particular number of questions on the subject, simply because requested to do so by [the defendant].”⁶⁸ It also limited the right in controversy to questioning regarding possible bias to *racial* bias, refusing to require the trial court to question prospective jurors regarding bias against persons with beards even though the defendant, who sported a beard, had requested such voir dire.⁶⁹

A mere three years later, the Court started backtracking from its support for voir dire into racial bias. In *Ristaino v. Ross*, the Court held that the mere fact that the defendant is Black and the victim is White is not enough to trigger the constitutional requirement that the trial court question prospective jurors about racial prejudice.⁷⁰ The defendants in *Ristaino v. Ross* were three Black men on trial for armed robbery, assault and battery by means of a dangerous weapon, and assault with intent to murder two White security guards.⁷¹ Defendant Ross requested that the trial judge ask prospective jurors the following question: “Are there any of you who believe that a White person is more likely to be telling the truth than a Black person?”⁷² The trial court not only refused to ask this particular question, it failed

63. *Id.* at 314.

64. *Id.* at 314–15.

65. *Id.* at 315.

66. *Ham v. South Carolina*, 409 U.S. 524, 529 (1973).

67. *Id.* at 527.

68. *Id.*

69. *Id.* at 527–28.

70. *Ristaino v. Ross*, 424 U.S. 589, 597 (1976).

71. *Id.* at 590.

72. *Id.* at 590 n.1.

to make any reference to race when giving jurors an overview of the facts of the case and when questioning the jurors about possible bias or prejudice for or against either of the defendants or the victim.⁷³ The jury convicted the defendants on all counts.⁷⁴

In holding that the trial court did not err in refusing to question the venire on racial bias, the Court attempted to distinguish the case before it from *Ham v. South Carolina*. Somewhat unconvincingly, the Court explained that racial issues were “inextricably bound up with the conduct of the trial” in *Ham* because Ham, who had a reputation as a civil rights activist, claimed that he had been framed because of his civil rights work.⁷⁵ The *Ristaino* Court continued, “The mere fact that the victim of the crimes alleged was a White man and the defendants were Negroes was less likely to distort the trial than were the special factors involved in *Ham*.”⁷⁶ The Court then established what some have called a “special circumstances” rule: a defendant has a constitutional right to have prospective jurors questioned on racial bias only if the circumstances of the case suggest a “significant likelihood” of prejudice by the jurors.⁷⁷

Even though the *Ristaino* Court refused to find a due process violation in the trial court’s failure to question jurors on racial bias, it did acknowledge the usefulness of asking questions on racial bias as a prudential matter. “Although we hold that *voir dire* questioning directed to racial prejudice was not constitutionally required, the wiser course generally is to propound appropriate questions designed to identify racial prejudice if requested by the defendant.”⁷⁸ The Court indicated that had the case been tried in federal court, it would have used its supervisory power to require the trial court to ask prospective jurors questions on racial bias.⁷⁹

In 1981, the Court revisited the issue of *voir dire* into racial bias in a case involving a defendant of Mexican descent. The defendant in *Rosales-Lopez v. United States* was charged with smuggling undocumented Mexican immigrants into the United States.⁸⁰ The defendant requested that prospective jurors be asked the following questions: “Would you consider the race or Mexican descent of Humberto Rosales-Lopez in your evaluation of this case? How would it affect

73. *Id.* at 592 nn.3–4.

74. *Id.* at 593.

75. *Id.* at 596–97.

76. *Id.* at 597.

77. *Id.* at 596–97; see also Laura A. Giantris, *The Necessity of Inquiry into Racial Bias in Voir Dire*, *The Maryland Survey: 1994-1995*, 55 MD. L. REV. 615, 629 (1996). Giantris discusses *Hill v. State*, a Maryland decision in which the Maryland Court of Appeals held that the trial court’s refusal to question the venire on racial or ethnic bias constituted constitutional error and concludes that “[a]s a result of *Hill*, Maryland criminal defendants no longer must meet the burdensome ‘special circumstances’ test as enunciated in *Thornton* and *Rosales-Lopez*.” *Id.*; see also Barry P. Goode, *Religion, Politics, Race, and Ethnicity: The Range and Limits of Voir Dire*, 92 KY. L.J. 601, 672 (2004) (“*Ristaino* established a ‘special circumstances’ rule: the Constitution only requires a court to allow defendants to ask questions designed to elicit racial prejudice when the special circumstances of a case indicate a significant likelihood of prejudice by the jurors.”).

78. *Ristaino*, 424 U.S. at 597 n.9.

79. *Id.*

80. *Rosales-Lopez v. United States*, 451 U.S. 182 (1981).

you?”⁸¹ The trial judge did not pose either of these questions to the prospective jurors, nor did he pose any questions specifically addressed to possible prejudice against the defendant because of his race or ethnicity.⁸² The trial judge instead asked the following questions of prospective jurors: “Do any of you have any feelings about the alien problem at all?”; and “Do any of you have any particular feelings one way or the other about aliens or could you sit as a fair and impartial juror if you are called upon to do so?”⁸³

In considering defendant Rosales-Lopez’s appeal, the Supreme Court started by discussing the importance of voir dire, noting that “[v]oir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored.”⁸⁴ The Court observed that lack of adequate voir dire impairs the trial court’s ability to remove jurors who cannot act impartially.⁸⁵ Next, the Court noted that “federal judges have been accorded ample discretion in determining how best to conduct the voir dire.”⁸⁶ This is due to the fact that the responsibility to impanel an impartial jury lies with the trial judge.⁸⁷ Additionally, the trial judge is able to see the prospective jurors and their responses, both verbal and nonverbal, to the questions posed to them during voir dire.⁸⁸

The Court next distinguished between questions directed at the discovery of racial prejudice that are constitutionally mandated and questions directed at the discovery of racial prejudice that are required of federal courts as a matter of the Court’s supervisory authority over the federal courts.⁸⁹ The Court then established a new nonconstitutional rule for federal courts, holding that federal courts must inquire into racial prejudice “when requested by a defendant accused of a violent crime and where the defendant and the victim are members of different racial or ethnic groups.”⁹⁰ In all other cases, the Court explained, reversible error will occur only when the circumstances of the case “indicate that there is a reasonable possibility that racial or ethnic prejudice might have influenced the jury.”⁹¹ Because Rosales-Lopez was charged with smuggling, not a crime of interracial violence, the trial court was not required to ask questions directed at racial prejudice even though requested to do so by the defense unless there was a reasonable possibility that racial

81. *Id.* at 185.

82. *Id.*

83. *Id.* at 186. It could be argued that the trial court’s use of the word “alien” to describe Rosales-Lopez encouraged the jurors to be biased against Rosales-Lopez. The word “alien,” which is used to refer to one who is an immigrant to the United States, conjures up images of aliens from outer space. Because of this, many progressives use the phrase “undocumented immigrant” rather than “illegal alien.”

84. *Id.* at 188.

85. *Id.*

86. *Id.* at 189.

87. *Id.*

88. *Id.*

89. *Id.* at 190.

90. *Id.* at 196.

91. *Id.* at 191. In other words, in all other cases, the special circumstances rule established in *Ristaino v. Ross* would control.

or ethnic prejudice influenced the jury.⁹² The Court did not believe such a possibility existed in this case.⁹³

While Rosales-Lopez may not have been happy with the Supreme Court's decision since the Court affirmed his conviction, the decision was partially good news for future defendants, as it established a new defense-friendly rule—albeit one that leaves discretion in the trial court's hands—for defendants seeking voir dire into racial bias in federal courts. In federal cases involving a defendant and a victim of different races or ethnicities and a crime of violence, the trial court should as a prudential matter conduct voir dire into racial prejudice if the defense requests that it do so.⁹⁴

In 1986, the Court addressed the issue of a defendant's right to have prospective jurors questioned on racial prejudice for the last time to date.⁹⁵ In *Turner v. Murray*, Willie Lloyd Turner, a Black man, was charged with capital murder and other crimes after fatally shooting a White jewelry store owner with a sawed off shotgun in front of a police officer and three witnesses.⁹⁶ Apparently, Turner became upset with the store owner after learning that he had triggered a silent alarm to summon the police to the store.⁹⁷

Prior to jury selection, Turner's attorney submitted to the trial judge a list of questions that he wished to ask the venire, including the following question: "The defendant, Willie Lloyd Turner, is a member of the Negro race. The victim, W. Jack Smith, Jr., was a White Caucasian. Will these facts prejudice you against Willie Lloyd Turner or affect your ability to render a fair and impartial verdict based solely on the evidence?"⁹⁸ The trial court refused to ask this question, instead asking the venire the more generic question "whether any person was aware of any reason why he could not render a fair and impartial verdict."⁹⁹ Everyone on the venire responded to this question in the negative.¹⁰⁰ At the time they were asked this question, the prospective jurors did not know that the victim was White.¹⁰¹ Eight

92. *Id.* at 192.

93. *Id.* at 193.

94. *Id.* at 192.

95. The Court has mentioned voir dire on racial bias in other cases, but this was not the main issue in those cases. *See, e.g.,* *Warger v. Shauers*, 135 S. Ct. 521, 529 n.3 (2014). The court held that a plaintiff in a personal injury suit may not use a juror affidavit detailing alleged juror dishonesty to get a new trial while noting in a footnote, "There may be cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged. . . . We need not consider the question, however, for those facts are not presented here." *Id.*; *see also, e.g.,* *Mu'Min v. Virginia*, 500 U.S. 415, 422–24 (1991) (finding no error in trial court's refusal to further question prospective jurors about news reports to which they had been exposed while discussing cases involving voir dire into racial bias as examples of state cases on the extent of voir dire examination).

96. *Turner v. Murray*, 476 U.S. 28, 29–30 (1986).

97. *Id.* at 30.

98. *Id.* at 30–31.

99. *Id.* at 31.

100. *Id.*

101. *Id.*

Whites and four Blacks were selected to serve on the jury.¹⁰² The jury found the defendant guilty of all charges, and after a separate sentencing hearing, recommended that Turner be sentenced to death.¹⁰³

Turner appealed his death sentence, which the Supreme Court reversed.¹⁰⁴ The Court started by reaffirming what it stated in *Ristaino*: the mere fact that the defendant is Black and the victim is White is not a special circumstance of constitutional significance.¹⁰⁵ The Court then distinguished this case from *Ristaino*, noting that in addition to the fact that Turner was Black and his victim was White, Turner was charged with a capital offense.¹⁰⁶ The Court explained why this one fact mattered so much. The jury in a capital case, the Court explained, has an enormous amount of discretion.¹⁰⁷ First, the capital jury must decide whether aggravating factors merit putting the defendant to death. The jury must decide, for example, whether the defendant is likely to commit future violent acts, or whether his crime was “outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim.”¹⁰⁸ Additionally, “the [capital] jury must consider any mitigating evidence offered by the defendant.”¹⁰⁹

Next, the Court exhibited an amazing amount of prescience in its recognition of the concept of implicit racial bias. Even though *Turner* was decided in 1986, almost thirty years ago, the Court at that time realized the “unique opportunity for racial prejudice to operate but remain undetected”:¹¹⁰

[A] juror who believes that Blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether petitioner’s crime involved the aggravating factors specified under Virginia law. Such a juror might also be less favorably inclined toward petitioner’s evidence of mental disturbance as a mitigating circumstance. More subtle, less consciously held racial attitudes could also influence a juror’s decision in this case. Fear of Blacks, which could easily be stirred up by the violent facts of petitioner’s crime, might incline a juror to favor the death penalty.¹¹¹

The *Turner* Court noted that in cases like the one before it where the defendant was charged with a crime of violence and the defendant and victim were of different races, there was a real risk that racial prejudice might infect the proceeding and improperly lead to a death sentence.¹¹² “The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality

102. *Id.*

103. *Id.*

104. *Id.* at 31–33.

105. *Id.* at 33.

106. *Id.*

107. *Id.* at 33–34.

108. *Id.* at 34.

109. *Id.*

110. *Id.* at 35.

111. *Id.*

112. *Id.*

of the death sentence.”¹¹³ The Court found the risk that racial prejudice may have infected Turner’s capital sentencing “unacceptable in light of the ease with which that risk could have been minimized.”¹¹⁴ In the Court’s view, the trial judge could have minimized this risk by questioning prospective jurors on racial prejudice but refused to do so.¹¹⁵ The Court concluded by holding that “a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias.”¹¹⁶ The Court made clear that “the trial judge retains discretion as to the form and number of questions on the subject.”¹¹⁷ Moreover, “a defendant cannot complain of a judge’s failure to question the venire on racial prejudice unless the defendant has specifically requested such an inquiry.”¹¹⁸

Turner thus established a constitutional right to voir dire into racial bias in all capital cases in which the defendant is charged with an interracial crime of violence, as long as the defendant specifically requests such voir dire.¹¹⁹ Oddly, however, the Court limited its holding by reversing only the death sentence Turner received, not his guilty conviction.¹²⁰ Even though the twelve jurors who voted to have Turner executed were the same jurors who found him guilty, the Court refused to vacate Turner’s conviction. The Court explained:

At the guilt phase of petitioner’s trial, the jury had no greater discretion than it would have had if the crime charged had been noncapital murder.

Thus, with respect to the guilt phase of petitioner’s trial, we find this case to be indistinguishable from *Ristaino*, to which we continue to adhere.¹²¹

The problem with this reasoning is that *Ristaino* is distinguishable from *Turner*. *Ristaino* was never at risk of being put to death, but Turner was. If Turner’s jury had not convicted him in the first place, he would not have been at risk of being executed. Moreover, if a juror’s racial beliefs might influence her to see the defendant as more violent and dangerous, and lead that juror to more readily accept evidence of aggravating factors and discount evidence of mitigating factors, then those same beliefs are likely to color the juror’s weighing of the evidence presented at the guilt phase of the trial.¹²²

The Supreme Court’s jurisprudence on voir dire into racial bias leaves us with the following general rules. A capital defendant charged with an interracial crime of

113. *Id.* at 36.

114. *Id.*

115. *Id.*

116. *Id.* at 36–37.

117. *Id.* at 37.

118. *Id.*

119. *Id.* at 36–37.

120. *Id.*

121. *Id.* at 37–38.

122. As noted by Justice Clark in *Gideon v. Wainwright*: “How can the Fourteenth Amendment tolerate a procedure which it condemns in capital cases on the ground that deprivation of liberty may be less onerous than deprivation of life—a value judgment not universally accepted . . . ?” *Gideon v. Wainwright*, 372 U.S. 335, 349 (1963) (Clark, J., concurring).

violence in either state or federal court has a due process right to have prospective jurors questioned on racial bias, but the defendant must specifically request such voir dire in order to trigger the constitutional right.¹²³ A noncapital defendant has a constitutional right to have prospective jurors questioned on racial bias only if the circumstances of the case suggest a significant likelihood of prejudice by the jurors.¹²⁴ The mere fact that the defendant and victim are of different races is not considered a special circumstance triggering the due process right to voir dire into racial bias.¹²⁵ A federal court overseeing a case involving a defendant charged with an interracial crime of violence should, as a prudential matter, allow the defense to question prospective jurors on racial bias as long as the defendant requests such voir dire.¹²⁶ The States of course are free to go further than the constitutional minimums set forth by the Supreme Court.

All of the Supreme Court cases on voir dire into racial bias to date have focused on whether the defendant has a right to such voir dire. The Court has never addressed the question of whether the government has a corresponding right to have prospective jurors questioned on racial bias. In certain cases, particularly in interracial cases involving a White defendant and a Black victim, the prosecutor may be concerned that racial stereotypes may lead jurors to sympathize with the defendant and have less empathy for the victim. Racial stereotypes about Black men as dangerous, violent criminals may encourage jurors to see the victim's actions as threatening and the defendant's actions as reasonable.

In perhaps the only law review article to focus on this question, Tania Tetlow argues that the Supreme Court should establish that the prosecutor shares the defendant's constitutional right to conduct voir dire into racial bias.¹²⁷ Tetlow notes that prosecutors are charged with "doing justice," and argues that "doing justice" includes ensuring equal protection of the law for defendants and victims alike.¹²⁸ One way to ensure equal protection for victims of color, Tetlow argues, is to allow prosecutors to question prospective jurors on racial bias so they can better ascertain which individuals can serve as truly impartial jurors.¹²⁹ Tetlow argues that the right to voir dire into racial bias should not be limited to capital cases in which the defendant is charged with an interracial crime of violence and cases involving a significant likelihood of prejudice in the jurors.¹³⁰ Although it is difficult to make a case for a constitutional right to voir dire into racial bias for prosecutors, I agree that as a prudential matter, courts should permit prosecutors as well as defense

123. *Turner*, 476 U.S. at 36–37.

124. *Ristaino v. Ross*, 424 U.S. 589, 596–97 (1976).

125. *Id.*

126. *Rosales-Lopez v. United States*, 451 U.S. 182, 192 (1981).

127. Tania Tetlow, *Granting Prosecutors Constitutional Rights to Combat Discrimination*, 14 U. PA. J. CONST. L. 1117 (2012).

128. *Id.* at 1125–26 (“Doing battle against discriminatory acquittal falls squarely within a prosecutor’s ethical duty to ‘do justice’ . . .”).

129. *Id.* at 1148–51.

130. *Id.* at 1151–52.

attorneys to conduct voir dire into racial bias in any case in which racial stereotypes may influence the jury.

II. SOCIAL SCIENCE RESEARCH ON RACE SALIENCE

A. *Implicit Bias*

Over the past decade, social scientists have convincingly demonstrated that bias is largely unconscious and often at odds with conscious beliefs.¹³¹ Even though one may sincerely believe that all individuals should be treated equally regardless of race, one may nonetheless have an implicit preference for individuals of one race over individuals of another race. This type of bias that exists outside of conscious awareness is called “implicit bias.”

Social scientists have demonstrated that most Americans are affected by implicit bias through an online test known as the Implicit Association Test (IAT). The IAT measures the amount of time that an individual takes to associate different words and images viewed on a computer screen.¹³² When individuals are asked to pair words and images and those pairings are consistent with widely held beliefs and attitudes, their response times are fairly quick.¹³³ When they are asked to pair words and images that do not correlate to widely held associations, response times are noticeably slower.¹³⁴ For example, individuals asked to pair names like Katie and Meredith with words or images reflecting pleasant and nice things and names like Ebony and LaTonya, names associated with African Americans, with words or images reflecting unpleasant or negative things were able to do this task fairly quickly.¹³⁵ When they were asked to pair White-sounding names with unpleasant or negative words and images and African American sounding names with pleasant or positive words and images, their response times were noticeably slower.¹³⁶ Since I have written at length about implicit bias in previous works, I will not repeat that discussion here.¹³⁷

Over fourteen million IATs, measuring bias based on age, gender, sexuality, among other types of biases, have been taken.¹³⁸ IAT research has shown that both young and old individuals tend to favor the young and disfavor the elderly.¹³⁹ Most

131. Laurie A. Rudman et al., “Unlearning” Automatic Biases: The Malleability of Implicit Prejudice and Stereotypes, 81 J. PERSONALITY & SOC. PSYCHOL. 856, 856 (2001).

132. Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1509–10 (2005).

133. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1130 (2012).

134. *Id.*

135. Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1465–68 (1998).

136. *Id.* at 1469–70.

137. See Lee, *supra* note 15, at 1570–72 (2013); Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 536–49 (2008).

138. MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, *BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE* 69 (2013).

139. Becca R. Levy & Mahzrin R. Banaji, *Implicit Ageism*, in *AGEISM: STEREOTYPING AND PREJUDICE AGAINST OLDER PERSONS* 49, 55 (Todd D. Nelson ed., 2002). Indeed, researchers have

heterosexuals taking the sexual orientation IAT have demonstrated an implicit bias in favor of heterosexuals over gays and lesbians.¹⁴⁰ Of those who have taken the race IAT, seventy-five percent have demonstrated implicit bias in favor of Whites over Blacks.¹⁴¹

B. Race Salience

In light of the research on implicit bias, social scientists have studied whether race salience can encourage individuals to overcome their implicit racial biases. “Race salience” is a term of art used by some social scientists to refer to the process of making salient the potential for racial bias.¹⁴² “Race salience” does not simply refer to juror awareness of the races of the defendant and victim.¹⁴³ It involves “making salient” the potential racism of jurors’ attitudes.¹⁴⁴

A wealth of fairly recent empirical research has shown that when race is made salient either through pretrial publicity, voir dire questioning of prospective jurors, opening and closing arguments, or witness testimony, White jurors are more likely to treat similarly situated Black and White defendants the same way.¹⁴⁵ For example, in one study, Steven Fein and others examined the effects of pretrial publicity on mock jurors.¹⁴⁶ The study found that most mock jurors were negatively influenced by newspaper articles that presented the facts in a way that disfavored the defendant, even when the mock jurors were told that the newspaper articles were inadmissible and should not be considered in deciding the defendant’s guilt.¹⁴⁷ However, when mock jurors were given information suggesting that the media’s treatment of the defendant was racially biased, the negative bias against the defendant that the mock jurors had previously exhibited disappeared.¹⁴⁸

In another experiment conducted by Samuel Sommers and Phoebe Ellsworth, jury-eligible citizens and actual jury pool members from a county in Michigan were

found that implicit ageism or implicit bias against the elderly is even more prevalent than implicit racial bias against Blacks. *Id.* at 54–55.

140. Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCHOL. 1, 19 (2007) (finding that sixty-eight percent of study participants showed an implicit preference for straight people over gay people).

141. BANAJI & GREENWALD, *supra* note 138, at 47.

142. Samuel R. Sommers & Phoebe C. Ellsworth, “Race Salience” in *Juror Decision-Making: Misconceptions, Clarifications, and Unanswered Questions*, 27 BEHAV. SCI. & L. 599, 601 (2009).

143. *Id.* at 603–05.

144. *Id.* at 601.

145. *Id.*

146. Steven Fein et al., *Hype and Suspicion: The Effects of Pretrial Publicity, Race, and Suspicion on Jurors’ Verdicts*, 53 J. SOC. ISSUES 487 (1997).

147. *Id.* at 497 (“Exposure to pretrial publicity that reported incriminating information about the defendant made our mock jurors more likely to reach guilty verdicts than the mock jurors in the control condition.”).

148. *Id.* (“The notable exception concerns mock jurors who received the incriminating pretrial publicity along with other publicity designed to make them suspect that the incriminating information may have been released to the public because of racist motives.”).

shown a videotaped summary of an actual rape trial involving a Black defendant.¹⁴⁹ Participants completed a voir dire questionnaire, watched a trial video, received actual State of Michigan pattern jury instructions, and deliberated on the case as members of six-person juries.¹⁵⁰ Although all the mock jurors viewed the same trial video, some received questions about their racial attitudes and general perceptions of racial bias in the legal system on their voir dire questionnaire while other mock jurors did not.¹⁵¹ For example, some mock jurors read the following race-relevant question: “The defendant in the case is African-American and the victims are White. How might this affect your perceptions of the trial?”¹⁵² Another race-relevant question was: “In your opinion, how does the race of a defendant influence the treatment s/he receives in the legal system as a whole?”¹⁵³

Sommers and Ellsworth found that regardless of their race, mock jurors who received the race-relevant voir dire questions were less likely to vote to convict the Black defendant than the mock jurors who did not receive race-relevant voir dire questions.¹⁵⁴ It is worth noting that the race relevant questions were not intended to identify jurors likely to exhibit racial bias in their judgments.¹⁵⁵ Rather, they were “designed to force mock jurors to think about their racial attitudes and, more generally, about social norms against racial prejudice and institutional bias in the legal system.”¹⁵⁶

Calling attention to the possibility of racial bias through witness testimony can also help minimize racial bias. In another study, Ellen Cohn and others found that White mock jurors were less likely to convict a Black defendant charged with attempted vehicular manslaughter after striking three White men with his car if presented with testimony from the defendant’s wife revealing that the White victims shouted racial slurs at the defendant and his wife before the defendant got into his vehicle and sped away.¹⁵⁷ Calling attention to the possibility that the victims may have been racially biased against the defendant may have encouraged the jurors to consider the facts with a bit more empathy for the defendant than they otherwise might have had.

Racial bias can also be reduced if race is made salient by attorneys in their opening and closing statements. Donald Bucolo and Ellen Cohn found that when a defense attorney called attention to the possibility of racial bias in his opening and closing statements, White mock jurors were less likely to find the Black male

149. Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries?: A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 1026 (2003).

150. *Id.*

151. *Id.*

152. *Id.* at 1027.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. Ellen S. Cohn et al., *Reducing White Juror Bias: The Role of Race Salience and Racial Attitudes*, 39 J. APPLIED SOC. PSYCHOL. 1953, 1959, 1964 (2009).

defendant guilty of assault and battery than when the attorney did not call attention to the possibility of racial bias in his opening and closing statements.¹⁵⁸ Statements making race salient included, “The defendant did what any (Black/White) man in this situation would do,” and “The only reason the defendant, and not the supposed victim, is being charged with this crime is because the defendant is (Black/White) and the victim is (White/Black).”¹⁵⁹ Bucolo and Cohn concluded that highlighting race in an interracial trial was a beneficial defense strategy when the defendant was Black, “leading to decreased ratings of guilt.”¹⁶⁰

III. SOCIAL SCIENCE RESEARCH ON RACIAL PERCEPTIONS OF CRIME AND SUPPORT FOR PUNITIVE CRIMINAL JUSTICE POLICIES

Some recent social science research on racial perceptions of crime and support for punitive policies calls into question whether making race salient is a good idea. In 2014, Rebecca Hetey and Jennifer Eberhardt published the results of experiments they conducted in San Francisco and New York City.¹⁶¹ In each experiment, they manipulated the racial composition of the prison population and then measured the subject’s support for or acceptance of a punitive criminal justice policy.¹⁶² They found that when the prison population was represented as more Black, participants were more supportive of punitive criminal justice policies.¹⁶³

In the first experiment, Hetey and Eberhardt tested support for California’s Three Strikes Law.¹⁶⁴ This law, passed in 1994, mandated a twenty-five-years-to-life prison sentence for anyone convicted of a felony after having been convicted of two prior violent or serious felonies.¹⁶⁵ Even a minor third felony such as “stealing a dollar in loose change from a parked car” could result in a life sentence under the Three Strikes Law as originally enacted.¹⁶⁶ In 2012, critics of the Three Strikes Law sought to amend it by permitting a twenty-five-years-to-life sentence only if the defendant’s third felony was a serious or violent felony.¹⁶⁷ The proposed amendment would appear on the November 2012 ballot only if enough signatures supporting the amendment were gathered.¹⁶⁸

In the experiment, a White female recruited registered California voters from

158. Donald O. Bucolo & Ellen S. Cohn, *Playing the Race Card: Making Race Salient in Defence Opening and Closing Statements*, 15 *LEGAL & CRIMINOLOGICAL PSYCHOL.* 293, 297, 299 (2010).

159. *Id.* at 297.

160. *Id.* at 299.

161. Rebecca C. Hetey & Jennifer L. Eberhardt, *Racial Disparities in Incarceration Increase Acceptance of Punitive Policies*, *PSYCHOL. SCI.* 1–6 (2014).

162. *Id.* at 1.

163. *Id.*

164. *Id.* at 2.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* The ballot initiative, California Proposition 36, did appear on the November 2012 ballot and passed. STANFORD JUSTICE ADVOCACY PROJECT, <https://law.stanford.edu/stanford-justice-advocacy-project/> [<https://perma.cc/F9CE-Y8NZ>] (last visited Sept. 16, 2015).

a San Francisco Bay Area commuter station to participate in the study, which was described to them as exploring Californians' views on social issues.¹⁶⁹ Participants, all of whom were Caucasian, were shown eighty color photographs of Black and White inmates on an iPad.¹⁷⁰ Some participants were shown fewer Black faces than other participants.¹⁷¹ In the "less Black" condition, only twenty-five percent of the photographs were of Black inmates, which was about the same percentage of Blacks actually in California prisons.¹⁷² In the "more Black" condition, forty-five percent of the photographs were of Black inmates, reflecting the approximate percentage of Blacks incarcerated under California's Three Strikes Law.¹⁷³ Next, the subjects were informed of California's Three Strikes Law and the initiative to amend it.¹⁷⁴ Subjects were asked to rate how punitive they thought the Three Strikes Law was.¹⁷⁵ The subjects were then told the study was over and that the experimenter had copies of the actual petition, which they could look at and sign if they wanted.¹⁷⁶ Subjects were told that if they signed the petition, their signature would be forwarded to the State Attorney General's office to be counted.¹⁷⁷

Hetey and Eberhardt found that regardless of the condition they were in ("more Black" or "less Black"), subjects across the board agreed that California's Three Strikes Law was too punitive rather than not punitive enough.¹⁷⁸ Subjects in the "less Black" condition, however, were much more willing to sign the petition to amend the law to require that the third felony conviction be a serious or violent felony than subjects in the "more Black" condition.¹⁷⁹ Of the participants who saw fewer photos of Black inmates, 51.72% signed the petition, whereas only 27.27% of participants who saw more photos of Black inmates signed the petition.¹⁸⁰ Hetey and Eberhardt concluded that the Blacker the participant believed the prison population to be, the less willing the participant was to amend a law they acknowledged was overly punitive.¹⁸¹

Hetey and Eberhardt conducted a second study (Study 2) in New York City, this time testing support for New York City's controversial stop-and-frisk policy.¹⁸² The researchers recruited White New York City residents to complete an online survey in October 2013.¹⁸³ Instead of showing participants photos of inmates, they

169. Hetey & Eberhardt, *supra* note 161, at 2.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 2–3.

180. *Id.* at 3.

181. *Id.*

182. *Id.*

183. *Id.*

simply presented participants with statistics about the prison population.¹⁸⁴ In the “less Black” condition, they told subjects that the prison population was 40.3% Black and 31.8% White, which was almost the actual percentage of Blacks in prisons across the nation.¹⁸⁵ In the “more Black” condition, they told subjects that the prison population was 60.3% Black and 11.8% White, approximately the actual percentage of Black inmates in New York City Department of Corrections facilities.¹⁸⁶ Next, participants were told that a federal judge had ruled that New York’s stop-and-frisk policy was unconstitutional (this was actually true) and that the city was appealing the judge’s ruling.¹⁸⁷ Participants were then asked a series of questions designed to measure their support for keeping New York’s stop-and-frisk policy.¹⁸⁸ Finally, participants were asked whether they would sign a petition to end New York City’s stop-and-frisk policy.¹⁸⁹

Hetey and Eberhardt found that regardless of what condition they were in, participants across the board felt that New York’s stop and frisk policy was “somewhat punitive.”¹⁹⁰ Participants in the “more Black” condition, however, were “significantly less willing to sign a petition to end the stop-and-frisk policy than were participants in the less-Black condition.”¹⁹¹ Only 12.05% of participants in the “more Black” condition said they would sign the petition compared to 33.3% in the “less Black” condition.¹⁹²

Also in 2014, The Sentencing Project published a report entitled, *Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies*.¹⁹³ The Sentencing Project found that skewed racial perceptions of crime by White Americans bolster their support for harsh criminal justice policies.¹⁹⁴ Synthesizing two decades of research,¹⁹⁵ The Sentencing Project reported that White Americans consistently overestimate the proportion of crime committed by persons of color.¹⁹⁶ The report theorized that attributing crime to racial minorities limits White Americans’ ability to empathize with offenders and encourages retribution as the primary response to crime.¹⁹⁷ The result: increased support for punitive criminal justice policies.

One might conclude that this recent research on racial perceptions of crime

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* at 4.

191. *Id.*

192. *Id.*

193. NAZGOL GHANDNOOSH, SENTENCING PROJECT, RACE AND PUNISHMENT: RACIAL PERCEPTIONS OF CRIME AND SUPPORT FOR PUNITIVE POLICIES (2014), http://sentencingproject.org/doc/publications/rd_Race_and_Punishment.pdf [<http://perma.cc/R4HH-GVRC>].

194. *Id.* at 5.

195. *Id.* at 3.

196. *Id.* at 5, 13.

197. *Id.* at 6, 18–19.

leading to increased support for punitive policies means that calling attention to race is a bad idea as it may simply remind jurors of the association between Black and crime and encourage White jurors to act more punitively towards Black defendants. The research, however, does not support such a conclusion. Recall that The Sentencing Project's report identified *skewed* or inaccurate racial perceptions of crime as the problem.¹⁹⁸ Similarly, Hetey and Eberhardt's Three Strikes study suggested that when individuals believed there were more Blacks in prison than might actually be the case, they were more supportive of punitive criminal justice policies.¹⁹⁹ Indeed, the Sentencing Project explicitly supports making race salient, noting that "[m]ock jury studies have shown that *increasing* the salience of race in cases *reduces* bias in outcomes by making jurors more conscious of and thoughtful about their biases."²⁰⁰ Making race and the possibility of racial bias salient, as opposed to highlighting extreme racial disparities in the prison population, can help reduce bias in jurors by encouraging them to think about and counter their own biases.

Implicit racial bias—unconscious racial bias even among people who explicitly disavow racial prejudice—contributes to inaccurate perceptions of race and crime because it encourages individuals to associate all or most Blacks and Latinos with crime when only some Blacks and Latinos are engaging in criminal behavior.²⁰¹ One way to overcome implicit racial bias is to recognize its existence. "Dispelling the illusion that we are colorblind in our decision making is a crucial first step to mitigating the impact of implicit racial bias."²⁰²

IV. COMBATING IMPLICIT RACIAL BIAS IN THE CRIMINAL COURTROOM

In light of the social science research on implicit bias, what steps can be taken to combat implicit racial bias in the criminal courtroom? This Section discusses a few different ways to address the problem of implicit bias in the courtroom. While the focus of this Article is on combating racial bias, the proposals discussed within can be helpful to attorneys concerned about bias of any kind.²⁰³

A. Raising Awareness of Implicit Bias Through Jury Orientation Materials

As Carol Izumi notes, "Awareness of bias is critical for mental decontamination success."²⁰⁴ If so, then making sure jurors know what implicit bias

198. *Id.* at 3, 5.

199. Hetey & Eberhardt, *supra* note 161, at 2.

200. GHANDNOOSH, *supra* note 193, at 39.

201. *Id.* at 14.

202. *Id.* at 39.

203. For an excellent discussion on the difficulties of conducting voir dire when the concern is bias against gays, lesbians, and other sexual minorities, see Giovanna Shay, *In the Box: Voir Dire on LGBT Issues in Changing Times*, 37 HARV. J.L. & GENDER 407 (2014).

204. Carol Izumi, *Implicit Bias and the Illusion of Mediator Neutrality*, 34 WASH. U. J.L. & POL'Y 71, 141 (2010) (citing Laurie A. Rudman et al., "Unlearning" Automatic Biases: The Malleability of Implicit Prejudice and Stereotypes, 81 J. PERSONALITY & SOC. PSYCHOL. 856 (2001)).

is and that they are likely to be affected by it is critical. Anna Roberts suggests one way to make jurors aware of the concept of implicit bias: include discussion of implicit bias in juror orientation materials. Roberts argues that including information about implicit bias in jury orientation materials, particularly jury orientation videos, makes sense for several reasons.²⁰⁵ First, information on implicit bias dovetails nicely with appeals to neutrality and egalitarian norms that are usually imparted to jurors during jury orientation.²⁰⁶ Second, “impressions formed early on can shape the understanding of what follows.”²⁰⁷ If a juror is made aware of implicit bias early on, she can better guard against it influencing her own decision making. Third, addressing implicit bias during jury orientation insures that all prospective jurors are educated about it, not just those who serendipitously end up with a judge who believes it important to mention the topic.²⁰⁸ Roberts goes further, suggesting not only that prospective jurors be informed about implicit bias during jury orientation but also that they should also be encouraged to take the IAT so they can experience bias within themselves.²⁰⁹ Although there is some research that suggests being forced to take diversity training leads to backlash and resistance,²¹⁰ this research does not undermine Roberts’ proposal because Roberts does not suggest that courts require all prospective jurors to take the IAT. She would merely have courts encourage prospective jurors to take the IAT on a voluntary basis.²¹¹

B. Raising Awareness of Implicit Bias Through Voir Dire

Voir dire on the topic of racial bias offers another way to make jurors aware of the concept of implicit bias. As discussed above, a wealth of social science research suggests that making race salient or calling attention to the possibility of racial bias can encourage prospective jurors to reflect on their own possible biases and consciously counter what would otherwise be automatic stereotype-congruent responses. Voir dire offers an opportunity to make race salient to prospective jurors.

Questions designed to explore the subject of racial bias through voir dire would have to be carefully formatted. Open-ended questions that encourage reflection and thought about the powerful influence of race would be better than close-ended questions that simply encourage the prospective juror to give the politically correct response.²¹² Open-ended questions in general offer prospective

205. Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 863–65 (2012).

206. *Id.* at 863.

207. *Id.* at 864.

208. *Id.*

209. *Id.* at 867–71.

210. See Rudman et al., *supra* note 204, at 857 (noting that involuntary diversity training has not been effective), 861 (noting that students who voluntarily enrolled in a diversity education seminar showed less implicit and explicit anti-Black bias at the end of the semester compared to students who did not take the class).

211. Roberts, *supra* note 205, at 874 (“The IAT would be optional . . .”).

212. Regina A. Schuller et al., *The Impact of Prejudice Screening Procedures on Racial Bias in the Courtroom*, 33 LAW & HUM. BEHAV. 320, 326 (2009).

jurors the chance to reflect and comment. Open-ended questions on racial bias in particular can give the attorney much more valuable information about which prospective jurors are likely to try to overcome their implicit biases than close-ended questions in which the juror is prompted to give a short “yes” or “no” response.²¹³

Jonathan Rapping, President and founder of Gideon’s Promise,²¹⁴ offers several examples of effective voir dire strategies for an attorney concerned about racial bias.²¹⁵ Rapping suggests that an attorney could start with the following:

You have just learned about the concept of [implicit racial bias]. Not everyone agrees on the power of its influence or that they are personally susceptible to it. I’d like to get a sense of your reaction to the concept of subconscious racial bias and whether you are open to believing it may influence you in your day-to-day decision-making. Let me start by asking for your reaction to learning about the idea of implicit, or subconscious, racial bias.²¹⁶

If a prospective juror expresses skepticism about implicit racial bias, Rapping recommends that the attorney respond as follows: “I appreciate your candor and thank you for sharing this view . . . it is certainly not an uncommon reaction to first learning about [implicit racial bias] . . . [D]o others share Juror Number X’s skepticism?”²¹⁷

The attorney concerned about implicit racial bias will also want to find out which prospective jurors are motivated to act in egalitarian ways since social science research suggests that egalitarian-minded individuals are more likely than hierarchical individuals to try to counteract stereotypical thinking when made aware of the possibility of racial bias.²¹⁸ To find out which individuals are motivated to act in egalitarian ways, Rapping cautions attorneys not to ask questions like “How do you feel about racism?” or “Do you believe it is ever appropriate to judge someone based on their skin color?” because prospective jurors may answer such questions by simply giving what they believe to be the socially desirable response.²¹⁹ Rapping suggests that the attorney instead ask prospective jurors to “[d]escribe [their] most significant interaction(s) with a member of another race” or “[d]escribe a particularly impactful interaction that [they or someone close to them] had with a member of another race.”²²⁰ Such questions force the prospective jurors to think

213. *Id.* at 326.

214. Founded by Jonathan Rapping, Gideon’s Promise is a nonprofit organization that provides comprehensive advocacy training and community building support for both entry-level and seasoned public defenders. See *FAQs*, GIDEON’S PROMISE, <http://gideonspromise.org/faqs/> [<http://perma.cc/K9Z5-7FP5>] (last visited Sept. 16, 2015).

215. Jonathan A. Rapping, *Implicitly Unjust: How Defenders Can Affect Systemic Racist Assumptions*, 16 N.Y.U. J. LEGIS. & PUB POL’Y 999, 1032 (2013).

216. *Id.*

217. *Id.* at 1033.

218. Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 14–15 (1989).

219. Rapping, *supra* note 215, at 1034.

220. *Id.*

about how they felt or acted in an actual situation as opposed to discussing how they think they would act in a hypothetical situation.²²¹ This is important because “people often aspire to act in ways that do not perfectly match how they have behaved in the past.”²²² As Rapping notes, “The best predictor of what a person will do in the future is not what they say they will do, but what they have done in the past in analogous situations.”²²³ An attorney might also ask a prospective juror to discuss “the best . . . experience the [prospective] juror has had with a member of another race” or ask the prospective juror to identify a member of another race whom the prospective juror admires.²²⁴ Such questions track the social science research on debiasing. This research indicates that encouraging people to think about admired African American figures, such as Barack Obama, Colin Powell, and Martin Luther King, and disfavored White individuals, such as Jeffrey Dahmer (the infamous serial killer also known as the Milwaukee Cannibal), Ted Kaczynski (the Unabomber), and Timothy McVeigh (the man responsible for the 1995 Oklahoma City bombing), can help jurors counter the impulse to associate Blacks with criminality.²²⁵

C. Possible Objections

My proposal that attorneys concerned about implicit racial bias use voir dire to counter the automatic stereotype-congruent associations that most individuals make based on race is likely to encounter resistance on a number of fronts. One possible objection echoes the concerns raised by Albert Alschuler several decades ago. Alschuler opined that voir dire into racial bias would be “minimally useful”²²⁶ because any prospective juror asked whether he would be prejudiced against the defendant because of the defendant’s race would find such a question patronizing

221. *Id.* Such questions could also force prospective jurors to think about whether they have ever had a significant interaction with a member of another race, which could also have a positive effect.

222. *Id.*

223. *Id.* (quoting Ira Mickenberg, *Voir Dire and Jury Selection*, NORTH CAROLINA DEFENDER TRIAL SCHOOL 6 (2011), <http://www.ncids.org/Defender%20Training/2011DefenderTrialSchool/VoirDire.pdf>).

224. *Id.* at 1035. Rapping suggests that the attorney should also ask the prospective juror to discuss negative experiences with members of another race and times that the juror relied on a stereotype that turned out to be wrong. *Id.* Reminding prospective jurors of negative experiences with members of another race, however, may trigger negative stereotypes, so I would focus on encouraging jurors to think about positive experiences with members of other racial groups and admired individuals belonging to the racial group in question.

225. Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCHOL. 800, 803–05 (2001) (finding that exposure to famous admired Black individuals and infamous disfavored White individuals lead to a reduction in automatic pro-White preferences); Jennifer A. Joy-Gaba & Brian A. Nosek, *The Surprisingly Limited Malleability of Implicit Racial Evaluations*, 41 SOC. PSYCHOL. 137 (2010) (finding that exposure to admired Blacks and disliked Whites resulted in a weaker automatic preference for Whites, but exposure to admired Blacks and admired Whites did not reduce automatic preference for Whites).

226. Alschuler, *supra* note 12.

and offensive.²²⁷ Alschuler suggested such voir dire would be akin to saying, “Pardon me. Are you a bigot?”²²⁸

Alschuler’s objection, however, is not responsive to my proposal since I do not encourage attorneys to ask prospective jurors whether they will be prejudiced against the defendant on account of his race. I agree with Alschuler that a question like, “Are you likely to be biased against the defendant because of his race?” is unlikely to provoke an admission of bias. Individuals in today’s society know that it is considered wrong to discriminate on the basis of race, so even an individual who might actually be biased against the defendant because of the defendant’s race would almost surely answer such a question in the negative in order not to appear bigoted. Even an individual who truly disavows racism and racial discrimination might answer such a question in the negative, sincerely believing that he or she will not be biased against the defendant on account of the defendant’s race, when social cognition research suggests that all individuals, even the most egalitarian-minded on explicit measures, are implicitly biased on the basis of race.²²⁹

I disagree, however, with Alschuler’s claim that voir dire into racial bias would be “minimally useful” in cases involving racial issues. Voir dire into racial bias can and should take the form of encouraging prospective jurors to think about racial bias in general. As discussed above, making race salient, whether through witness testimony or questions asked during voir dire, can inhibit the automatic associations that otherwise are likely to come into play when the defendant, the victim, or a witness is a member of a racially stereotyped group.²³⁰

A second possible objection is more troubling and involves a burgeoning field of research on stereotype threat. As Song Richardson and Philip Atiba Goff explain, “[s]tereotype threat refers to the concern with confirming or being evaluated in terms of a negative stereotype about one’s group.”²³¹ Most of us are aware of the concept of stereotype threat from Claude Steele’s research in the 1990s on African American undergraduate students faring poorly on standardized tests.²³² Steele’s research showed that anxiety about confirming the stereotype that links African Americans to lack of intelligence results in African Americans doing poorly on

227. *Id.* at 161.

228. *Id.*

229. BANAJI & GREENWALD, *supra* note 138, at 158–59. Sheri Lynn Johnson explains that “[a]sking a general question about impartiality and race is like asking whether one believes in equality for Blacks; jurors may sincerely answer yes, they believe in equality and yes, they can be impartial, yet oppose interracial marriage and believe that Blacks are more prone to violence.” Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1675 (1985). Johnson also explains that prospective jurors “would naturally be reluctant to admit [prejudiced attitudes], particularly since they know that social disapproval will be publicly expressed by dismissing them from the venire.” *Id.*

230. See *infra* text accompanying notes 142–160.

231. L. Song Richardson & Phillip Atiba Goff, *Interrogating Racial Violence*, 12 OHIO ST. J. CRIM. L. 115, 124 (2014).

232. Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797 (1995); see also Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOLOGIST 613 (1997).

standardized tests.²³³ Subsequent research has confirmed that “[t]he concern with being negatively stereotyped often provokes anxiety, leading to physical and mental reactions that are difficult, if not impossible to volitionally control such as increased heart rate, fidgeting, sweating, averting eye gaze, and cognitive depletion—often leading to a reported inability to think clearly.”²³⁴

Stereotype threat affects not only African Americans, but also anyone who belongs to a group that is negatively stereotyped. For example, women as a group suffer from the stereotype of not being good at math.²³⁵ When women are reminded of this stereotype, they tend to perform worse on math tests than when they are not reminded of the stereotype.²³⁶ Stereotype threat afflicts not just members of historically disadvantaged groups; it has also been shown to afflict White police officers concerned with being seen as racist.²³⁷ In *Interrogating Racial Violence*, Song Richardson and Phillip Atiba Goff document a study involving police officers with the San Jose, California Police Department.²³⁸ Surprisingly, the officers most concerned with not being or appearing to be racist were found to be quicker to use physical force to control situations involving Black suspects than officers who were not as concerned with how they were perceived by others.²³⁹ To explain these findings, Richardson and Goff theorize that an officer who fears that a suspect sees him as racist will believe that he cannot rely on moral authority to control the situation, and thus must resort to physical force.²⁴⁰

If White police officers concerned about being seen as racist (i.e., officers concerned about the White-cop-as-racist stereotype) end up acting in more racially disparate ways than White police officers not so concerned about being seen as racist, should we worry that White jurors made aware of their own implicit biases

233. Steele & Aronson, *supra* note 232.

234. Richardson & Goff, *supra* note 231.

235. Laurie T. O'Brien & Christian S. Crandall, *Stereotype Threat and Arousal: Effects on Women's Math Performance*, 29 PERSONALITY & SOC. PSYCHOL. BULL. 782, 784 (2003) (noting the stereotype of male superiority in math).

236. *Id.* (finding that women who were told that the test they were going to take had been shown to produce gender differences did less well on math tests than women who were told that the test they were about to take had not been shown to produce gender differences); see also Paul G. Davies et al., *Consuming Images: How Television Commercials That Elicit Stereotype Threat Can Restrain Women Academically and Professionally*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 1615, 1624 (2002) (finding that women exposed to gender-stereotypic television commercials underperformed on the math portion of a nondiagnostic test); Steven J. Spencer et al., *Stereotype Threat and Women's Math Performance*, 35 J. EXPERIMENTAL SOC. PSYCHOL. 4, 13 (1999) (finding that women who were told that the math test they were about to take was one in which gender differences do not occur performed just as well as men taking the same test, but women told that the test they were about to take was one in which gender differences had occurred performed worse than men taking the same test).

237. Richardson & Goff, *supra* note 231, at 126 (describing study involving the use of force by police officers with the San Jose Police Department).

238. *Id.*

239. *Id.* (“[T]he more officers were concerned with appearing racist, the more likely they were to have used force against Black suspects, but not suspects of other races, throughout the course of their careers.”).

240. *Id.*

will become overly concerned with not appearing racist and end up acting in ways that disadvantage Black defendants and victims over White defendants and victims? While certainly possible, I do not think this is likely because there is no prevailing stereotype of the White racist juror whereas at least in some communities, there seems to be an existing stereotype of the White racist police officer. While certain communities may view White jurors with distrust, most Whites do not think of themselves as racist and, more importantly, do not think others generally view them as racist. Nonetheless, the research on stereotype threat suggests that attorneys attempting to raise awareness of implicit racial bias during voir dire must be careful not to trigger anxiety in prospective jurors that they might be seen as racist.²⁴¹ Making jurors aware of their own implicit biases while not triggering stereotype threat is likely to be a difficult balancing act, somewhat like walking on a very thin tight rope.

CONCLUSION

In cases in which racial stereotypes about either the defendant, the victim, or a witness may influence the fact finder's assessment of who was at fault, it is important for attorneys concerned about minimizing the risk of racial bias to be aware of the social science research on race salience. This research suggests that calling attention to race can help reduce racial bias in legal decision making. Voir dire into racial bias offers one way an attorney can make race salient to the jury. Calling attention to race can help minimize racial bias by encouraging jurors to consciously think about the impropriety of racial stereotyping.

241. But see Phillip Atiba Goff et al., *The Space Between Us: Stereotype Threat and Distance in Interracial Contexts*, 94 J. PERSONALITY & SOC. PSYCHOL. 91 (2008) (finding that White, male undergrad students at Stanford University reminded of the stereotype that Whites are racist and told that they would be discussing the subject of racial profiling with two partners positioned their chairs further away from their partners when they thought their partners would be Black than when they thought their partners would be White).

JEFF ADACHI, SBN #121287
Public Defender
City and County of San Francisco
MATT GONZALEZ
Chief Attorney
555 Seventh Street
San Francisco, CA 94103
Direct:(415) 553-9520
Main: (415) 553-1671

Attorneys for MICHAEL SMITH

**Superior Court of the State of California
County of San Francisco**

People of the State of California,

Plaintiff,

vs.

Michael Smith,

Defendant.

Ltd. Juris. No.: 16013940

**Motion to Allow Reasonable &
Effective Voir Dire on Issues of
Race, Implicit Bias & Attitudes,
Experiences and Biases
Concerning African Americans.**

Date:
Time:
Dept:

To the District Attorney of San Francisco and to the above-entitled Court:

The defendant Michael Smith hereby moves for an extended voir dire, based on the specific facts of this case and the need to adequately question the jurors on their ability to be fair and impartial in this case. Defendant specifically requests up to 90 minutes with the first 24 jurors, and 45 minutes for each group of jurors thereafter. The legal justification for this request is set forth below.

1. Introduction

Michael Smith is accused of violating Penal Code § 243(six counts) and 148 (one count). The alleged facts contained in the police report are as follows:

On July 29, 2016, BART officers received a call that two suspects had threatened to rob a man and that a black male wearing a Mickey Mouse shirt, tan shorts and a backpack was armed with a gun. That call was made by Gilbert Rodriguez, who is identified as a

1 white male in the police report. Officers Trabanino, Wilson, Chung and Velasquez-Ocha
2 responded to the Embarcadero BART Station. Immediately upon seeing Michael Smith
3 and his girlfriend, Andrea Appleton, who was pregnant at the time, they ordered them to
4 the ground at gunpoint. They then took Mr. Smith down to the ground forcibly and three
5 officers jumped on top of him. After a brief struggle, Mr. Smith was taken into custody.
6 No firearm was found on Mr. Smith. Mr. Smith is an African-American male, age 22, as
7 is his girlfriend Andrea Appelton.

8 In this motion, Mr. Smith requests time to conduct voir dire in this case on the
9 following issues: 1) race and racism; 2) jurors' knowledge and awareness of implicit or
10 explicit bias and 3) attitudes, experiences and biases concerning African Americans.

11 **2. Argument**

12 **A. The Right to an Impartial Jury is a Fundamental Due Process Right**

13 In *Rosales-Lopez*,¹ the U.S. Supreme Court recognized voir dire plays a critical
14 function in assuring a criminal defendant that his Sixth Amendment right to an impartial
15 jury will be honored. A defendant is entitled to question prospective jurors on the issue
16 of possible racial bias.² In *Taylor*, the California Supreme Court, citing *Mu'Min v.*
17 *Virginia*,³ notes broadly that "the 14th Amend[ment] requires inquiry into racial prejudice
18 in cases involving a black defendant accused of violent crimes against a white victim."⁴
19 To be sure, inquiries on voir dire regarding jurors' racial biases are not limited to capital
20 cases.⁵ In *Wilborn*, an African-American defendant's trial strategy was to challenge the
21 credibility of the white officers who stopped and then arrested him for a drug offense;
22 defense counsel asked that the prospective jurors be questioned about racial bias, but the
23 trial court refused to inquire into the subject, saying it "would rather not get into race."⁶
24

25 ¹ *Rosales-Lopez v. U. S.* (1981) 451 U.S. 182, 188.

26 ² *People v. Taylor* (2010) 48 Cal.4th 574, 608.

27 ³ *Mu'Min v. Virginia* (1991) 500 U.S. 415, 424.

28 ⁴ *People v. Taylor, supra*, 48 Cal. 4th at 608.

⁵ *See, e.g., People v. Wilborn* (1999) 70 Cal.App.4th 339, 343-346.

⁶ *Id.* at 345.

1 The Court of Appeal reversed concluding that under the circumstances of the case, the
2 trial court had an obligation to make “*some inquiry*”⁷ into racial bias and “[b]ecause none
3 was made, the appellate court concluded, the defendant was deprived of his right to an
4 impartial jury.”⁸

5 As demonstrated in the many cases that have been overturned based on the denial of
6 proper voir dire on the issue of racial bias, the trial judge’s exercise of discretion in the
7 questioning of prospective jurors during voir dire commands deference from an appellate
8 court, but it is not without limit.⁹ “[W]ith the heightened authority of the trial court in the
9 conduct of voir dire ... goes an increased responsibility to assure that the process is
10 meaningful and sufficient to its purpose of ferreting out bias and prejudice on the part of
11 prospective jurors.”¹⁰

12 Where racial bias is concerned, the judge’s duty to inquire comes from California law
13 as well as from the Sixth and Fourteenth Amendments to the United States Constitution.¹¹
14 “If the judge fails so abjectly in this duty that prospective jurors can conceal racial bias
15 with impunity, the judge’s failure violates the defendant’s right to a fair and impartial
16 jury and renders the ensuing trial fundamentally unfair.”¹² Without an adequate voir dire,
17 the trial *judge’s* responsibility to remove prospective jurors, who will not be able to
18 impartially follow the court’s instructions and evaluate the evidence, cannot be fulfilled.¹³

21 ⁷ *Id.* at 348.

22 ⁸ *Id.*

23 ⁹ *People v. Mello* (2002) 97 Cal.App.4th 511, 516 citing: *Mu’Min v. Virginia*, *supra*, 500
24 U.S. at 424; *People v. Holt* (1997) 15 Cal.4th 619, 660-661; *People v. Wilborn*, *supra*, at
343-346.

25 ¹⁰ *Id.* at 516 citing: *People v. Taylor* (1992) 5 Cal.App.4th 1299, 1314.

26 ¹¹ *People v. Mello*, *supra*, at 516; *Mu’Min v. Virginia* 500 U.S. 415, 424; *People v. Holt*
15 Cal.4th 619, 660-661; *People v. Wilborn* 70 Cal.App.4th 339, 343-346.

27 ¹² *Id.* citing: *People v. Holt*, *supra*, 15 Cal.4th at 661; *People v. Wilborn*, *supra*, 70
28 Cal.App.4th at 346.

¹³ *Rosales-Lopez*, *supra*, at 188.; See also: *Connors v. United States* (1895) 158 U.S. 408,
413.

1 Similarly, lack of adequate voir dire impairs the *defendant's* right to exercise peremptory
2 challenges.¹⁴

3 In *Swain v. Alabama*,¹⁵ the Court noted the connection between voir dire and the
4 exercise of peremptory challenges: "The voir dire in American trials tends to be extensive
5 and probing, operating as a predicate for the exercise of peremptories"¹⁶ "[A]
6 suitable inquiry is permissible in order to ascertain whether the juror has any bias,
7 opinion, or prejudice that would affect or control the fair determination by him of the
8 issues to be tried."¹⁷

9 Recently, the California Supreme Court noted in *In re Boyette* that a "lack of adequate
10 voir dire impairs the defendant's right to exercise peremptory challenges where provided
11 by statute or rule. The ability of a defendant, either personally, through counsel, or by the
12 court, to examine the prospective jurors during voir dire is thus significant in protecting
13 the defendant's right to an impartial jury."¹⁸ Voir dire provides a means of discovering
14 actual or implied bias and a firmer basis upon which the parties may exercise their
15 peremptory challenges intelligently.¹⁹ Indeed, "voir"²⁰ means "to see" and "dire"²¹
16 means "to say" which suggests a duality; this duality is essential to the process of jury

17
18 ¹⁴ *Id.*

19 ¹⁵ *Swain v. Alabama* (1965) 380 U.S. 202.

20 ¹⁶ *Id.*, at 218-219.

21 ¹⁷ *Mu'Min v. Virginia* (1991) 500 U.S. 415, 422.

22 ¹⁸ *In re Boyette* (2013) 56 Cal.4th 866, 888.

23 ¹⁹ *See, e.g., Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 602 (1976) (voir dire
24 "facilitate[s] intelligent exercise of peremptory challenges and [helps] uncover factors
25 that would dictate disqualification for cause"); *United States v. Whitt*, 718 F.2d 1494,
26 1497 (10th Cir.1983) ("Without an adequate foundation [laid by voir dire], counsel cannot
27 exercise sensitive and intelligent peremptory challenges").

28 ²⁰ *Voir Definition*, CollinsDictionary.com,
<http://www.collinsdictionary.com/dictionary/french-english/voir> (last visited Aug. 23,
2016).

²¹ *Dire Definition*, CollinsDictionary.com,
<http://www.collinsdictionary.com/dictionary/french-english/dire> (last visited Aug. 23,
2016).

1 selection. For if conducted properly, voir dire can inform litigants about biases of
2 potential jurors; and it can also enlighten prospective jurors that reliance upon
3 stereotypical and pejorative notions about a particular gender or race are both
4 unnecessary and unwise.

5 **B. Code of Civil Procedure Section 223 Allows Counsel to Examine Any and**
6 **All Prospective Jurors.**

7 Civ. Proc., section 223, amended in 2000, provides that counsel for each party, on
8 completion of initial examination by the court, "*shall have the right to examine*, by oral
9 **and** direct questioning, **any and all of the prospective jurors.**"²² This amendment
10 eliminated the previous need for counsel to demonstrate good cause to be allowed to
11 examine prospective jurors that existed for a short window of time. Defense counsel is
12 entitled to a "reasonable inquiry" into specific legal doctrines that are both "material to
13 the trial and controversial."²³ A doctrine is considered "controversial" if it is likely to
14 invoke strong feelings and resistance to [its] application."²⁴ "[L]ack of adequate voir dire
15 impairs the defendant's right to exercise peremptory challenges where provided by
16 statute or rule . . ."²⁵ The statute is clear that the defense shall have the right to examine
17 any and all prospective jurors. This mandate is not met with a limitation of voir dire
18 where the venire will consist of 18-24 potential jurors. It must be that if everyone is to be
19 examined, particularly in a serious case where bias is a component, then counsel must be
20 given a significant amount of time in order for the court to abide by this statute. To be
21 sure, at the very least, counsel cannot meaningfully discuss the potential bias in this case
22 without having a seven to ten-minute discussion with each potential juror. Therefore, the
23 request for four hours of voir dire appears to be proper and sufficient.

24
25
26

²² Code of Civil Procedure section 223 (emphasis added).

27 ²³ *People v. Balderas* (1985) 41 Cal.3d 144, 183-184; *People v. Love* (1960) 53 Cal.2d
28 843, 852, fn. 1.

²⁴ *People v. Johnson* (1989) 47 Cal.3d 1194, 1225.

²⁵ *Rosales-Lopez v. U.S.*, *supra*, at 188.

1 **C. Extensive Questioning on Jurors' Racial Biases Must Be Allowed in this**
2 **Case Which Alleges an Assault on BART Police by an African American**
3 **Defendant.**

4 The U.S. Supreme Court has held that, upon request, voir dire questions concerning
5 race must be allowed upon a showing that the circumstances of the case might suggest a
6 'reasonable possibility' that racial prejudice would influence the jury.²⁶

7 In *Aldridge v. U.S.*, the U.S. Supreme Court reversed an African American
8 defendant's murder conviction where the trial judge refused a defense request to question
9 jurors on racial prejudice.²⁷ Aldridge was convicted of first degree murder and sentenced
10 to death in the killing of a white police officer. In rejecting the government's argument
11 that allowing inquiry into racism would be detrimental to the administration of the law in
12 the courts, the Court said: "We think that it would be far more injurious to permit it to be
13 thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors
14 and that inequities designed to elicit the fact of disqualification were barred."²⁸ Allowing
15 questioning of jurors on the issue of racial bias is not confined to serious or violent cases.

16 For instance, in *Ham v. South Carolina*²⁹, where an African American civil rights
17 activist was charged with marijuana possession, the court held that a trial judge's refusal
18 to question prospective jurors as to possible racial prejudice violated the defendant's
19 constitutional rights.³⁰ The Court went further than it had in *Aldridge*, holding that "the
20 Due Process Clause of the Fourteenth Amendment requires that ... the [defendant] be
21 permitted to have the jurors interrogated on the issue of racial bias."³¹ The law has
22 evolved significantly from *Ham* to the present with a few, for lack of a better term,
23 hiccups along the way.

24
25
26 ²⁶ *Id.* at 192.

27 ²⁷ *Aldridge v. U.S.* (1931) 283 U.S. 308.

28 ²⁸ *Id.* at 314.

29 ²⁹ *Ham v. South Carolina* (1973) 409 U.S. 524, 529.

30 ³⁰ *Ham v. South Carolina* (1973) 409 U.S. 524, 529.

31 ³¹ *Id.* at 527.

1 Just three years after *Ham*, in *Ristaino v. Ross*,³² the United States Supreme Court
2 dealt with two discreet questions. “[W]hether a defendant is entitled to require the asking
3 of questions specifically directed to racial prejudice and whether *Ham* announced a
4 requirement applicable whenever there may be a confrontation in a criminal trial between
5 persons of different races or ethnic origins.”³³ The court held, on the former issue, that
6 such an inquiry is not always required absent a showing of a significant likelihood that
7 racial prejudice might infect the trial.³⁴ In *Ristaino*, defendant failed to adequately
8 articulate that there were racial factors in play in his particular case. He then relied on the
9 status of the victim as a “security guard acting as a policeman”³⁵ to justify his request for
10 inquiry on race. It is not surprising that the trial court allowed inquiry as to bias
11 regarding police officers, but not as to race.³⁶ It is equally understandable that the trial
12 court and the High Court found that the defendant’s proffer was inadequate where the
13 defense attorney himself, inartfully stated: “[t]here is only one thing. The only reference
14 I would make to the facts of this case—the victim[’s] being white, and that he was a
15 security guard in uniform and acting as a policeman.”³⁷ With nothing more to support a
16 racial component to the case, the Court found that the trial court’s decision to not allow
17 questioning based on racial bias was within the Constitution.³⁸

18 On the latter issue, the *Ristaino* court answered that *Ham* did not announce a
19 requirement of “asking . . . a question specifically directed to racial prejudice” whenever
20 there is a possibility of “a confrontation in a criminal trial between persons of different
21 races or different ethnic origins.”³⁹ The *Ristaino* Court explained that the determination
22 of whether questions directed at ascertaining racial prejudice amongst prospective jurors
23 are warranted is based upon the specific circumstances and “racial factors” of each case.⁴⁰

24 _____
25 ³² *Ristaino v. Ross*, *supra*.

26 ³³ *Id.*

27 ³⁴ *Id.* at 598.

28 ³⁵ *Id.* at 599 (J, Marshall dissenting).

³⁶ *Id.* at 598.

³⁷ *Id.* at 591 n.2.

³⁸ *Id.* at 598.

³⁹ *Ristaino v. Ross*, *supra*, at 590.

⁴⁰ *Id.* at 598.

1 As this area of law evolved from *Aldridge* to *Rosales-Lopez* and beyond, what has
2 become abundantly clear is that the examination of prospective jurors on the issue of race
3 is warranted in cases involving a violent criminal offense and racial difference between
4 defendant(s) and the complaining witness(s). As stated in *Rosales-Lopez*, “*Aldridge* and
5 *Ristaino* together fairly imply that federal trial courts **must make** such an inquiry when
6 requested by a defendant accused of a violent crime and where the defendant and the
7 victim are members of different racial and ethnic groups.”⁴¹ As the High Court
8 articulated, although judges are understandably hesitant to discuss the possibility that
9 justice in a court of law may turn upon the pigmentation of skin, “this must be balanced
10 against the criminal defendant’s perception that avoiding this inquiry does not eliminate
11 the problem, and that his trial is not the place in which to elevate appearance over
12 reality.”⁴² In re-stating the principle announced in *Aldridge*—that it would be “far more
13 injurious to permit it to be thought that persons entertaining a disqualifying prejudice
14 were allowed to serve as jurors and that inequities designed to elicit the fact of
15 disqualification were barred”—The Court once again acknowledged the critical
16 importance of conducting voir dire regarding racial bias.⁴³ The *Rosales-Lopez* Court
17 articulated a standard that if the circumstances indicate that there was a ‘reasonable
18 possibility’ that racial prejudice would influence the jury,⁴⁴ then inquiry as to racial bias
19 would be required. *Rosales-Lopez* further explained:

20 This supervisory rule is based upon and consistent with the
21 “reasonable possibility standard” articulated above. It remains an
22 unfortunate fact in our society that violent crimes perpetrated against
23 members of other racial or ethnic groups often raise such a
24 possibility. There may be other circumstances that suggest the need
25 for such an inquiry, but the decision as to whether the total
26 circumstances suggest a reasonable possibility that racial or ethnic
27 prejudice will affect the jury remains primarily with the trial court,
28 subject to case-by-case review by the appellate courts.⁴⁵

⁴¹ *Rosales-Lopez v. U.S.*, *supra*, at 192 (emphasis added).

⁴² *See, e.g.*, *Rosales-Lopez*, *supra*, at 191.

⁴³ *Id. citing: Aldridge*, *supra*, at 314-315.

⁴⁴ *Id.* at 192.

⁴⁵ *Id.*

1 In order for a court to abide by the Constitutional standards of *Aldridge* and its
2 progeny, an inquiry regarding race bias must be made, upon the request of the defendant,
3 where there is a crime of violence involving a defendant and victim of different races,
4 and there is a reasonable possibility that racial prejudice would influence the jury. In the
5 case now before this court, such is the circumstance. Defendant is charged with
6 committing battery on BART police in an incident involving allegations made by a white
7 male; he is African-American, the key witness is white and the complaining witnesses are
8 White, Black, Latino and Asian. There is no question that the issue of race must be
9 addressed in voir dire. To further make the point, there is a plethora of psychological
10 research studies and papers published after *Aldridge*, *Ham*, *Ristaino*, and *Rosales-Lopez*
11 that support this position. Not only has the case law evolved, but our understanding of
12 bias, implicit bias, psychological factors, and how those factors could influence a jury
13 and detrimentally impact an African American defendant are now well established.
14

15 **D. Defendant Must Be Allowed to Address Implicit Bias in Voir Dire Due to**
16 **the Potential Impact that Race May Play in the Outcome of This Trial.**

17 The cases above make it clear that when racial attitudes may have an impact on
18 the jurors' judgment and decision-making in a particular case, questioning regarding race
19 must be allowed. California law is in accord.⁴⁶

20 voir dire examination serves to protect [a criminal defendant's right
21 to a fair trial] by exposing biases, both known and unknown on the
22 part of potential jurors. Demonstrated bias in the responses to
23 questions on voir dire may result in a juror's being excused for
24 cause. Hints of bias not sufficient to warrant challenge for cause may
25 assist parties in exercising their peremptory challenges.⁴⁷

26
27
28 ⁴⁶ *People v. Wilborn*, *supra*, 70 Cal.App.4th at 339; *People v. Mello*, *supra*, 97
Cal.App.4th at 516; *People v. Holt*, *supra*, 15 Cal.4th at 660-661.

⁴⁷ *In re Boyette*, *supra*, at 888-889.

1 Accordingly, in questioning the jurors on racial bias, defense counsel should also be
2 allowed to voir dire on the subject of not only explicit, but implicit bias. This takes time
3 and effort but is essential.

4 Research by psychologists have clearly demonstrated that race has the potential to
5 impact trial outcomes.⁴⁸ According to the National Center for State Courts, unlike
6 explicit bias—which reflects the attitudes or beliefs that one endorses at a conscious
7 level—implicit bias is the bias in judgment and/or behavior that results from subtle
8 cognitive processes (e.g., implicit attitudes and implicit stereotypes) that often operate at
9 a level below conscious awareness and without intentional control. Implicit bias may
10 develop from a history of personal experiences that connect certain racial groups with
11 fear or other negative affect or stereotypes. Recent developments in the field of cognitive
12 neuroscience demonstrate a link between implicit (but not explicit) racial bias and neural
13 activity in the amygdala, a region in the brain that scientists have associated with
14 emotional learning and fear conditioning.⁴⁹

15 Although people may not even be consciously aware that they hold biased attitudes,
16 over the past few decades, scientists have developed new measures to identify these
17 unconscious biases, including the Implicit Association Test (IAT). The IAT measures the
18 amount of time that an individual takes to associate negative and positive words with
19 images of African American and white individuals viewed on a computer screen. Of the
20 14 million who have taken the race IAT, seventy-five percent have demonstrated an
21 implicit bias favoring whites and disfavoring African Americans.⁵⁰

25 ⁴⁸ Samuel R. Sommers, *Race and the decision making of juries*. The British
26 Psychological

27 Society, *Legal and Criminological Psychology*, 2007, 12, 171-187.

28 ⁴⁹ *Helping Courts Address Implicit Bias*, National Center for State Courts,
www.ncsc.org/ibreport

⁵⁰ Banaji & Greenwald, *Blindspot: Hidden Biases of Good People* 69 (2013)

1 In the context of juror decision-making, implicit bias studies demonstrate a tendency
2 to implicitly associate African Americans with crime⁵¹ and racial biases in the context of
3 detain-release decisions, verdicts, and sentencing.⁵² However, the great body of research
4 has shown that effect of implicit bias can be substantially reduced by taking certain
5 steps.⁵³ Among them is the simple task of making people aware of their biases; once
6 people are made aware of their own implicit biases, they can begin to consider ways in
7 which to address them and ameliorate any unintended potential impact the bias may have
8 on their decision-making. For instance, according to the National Center for State Courts,
9 scientists have uncovered several promising implicit bias intervention strategies that may
10 help individuals who strive to be egalitarian: 1) consciously acknowledge group and
11 individual differences (i.e., adopt a multiculturalism approach to egalitarianism rather
12 than a color-blindness strategy in which one tries to ignore these differences); 2)
13 routinely check thought processes and decisions for possible bias (i.e., adopt a thoughtful,
14 deliberative, and self-aware process for inspecting how one's decisions were made); 3)
15 identify sources of stress and reduce them in the decision-making environment; 4)
16 identify sources of ambiguity and impose greater structure in the decision-making
17 context; 5) institute feedback mechanisms; and 6) increase exposure to stereotyped group
18 members (e.g., seek out greater contact with the stigmatized group in a positive context).
19 Thus, during voir dire, counsel can help jurors avoid relying on unconscious bias by
20 making them aware that such biases exist.⁵⁴ By simply raising awareness of implicit bias
21 in voir dire, it will not only allow for more seamless disclosure of possible biases by

22 ⁵¹ Eberhardt, J., Goff, P., Purdie, V., & Davies, P. (2004). *Seeing Black: Race, crime, and*
23 *visual processing*. Journal of Personality and Social Psychology, 87, 876-893.

24 ⁵² Gazal-Ayal, O., & Sulitzeanu-Kenan, R. (2010). *Let my people go: Ethnic in-group*
25 *bias in judicial decisions - Evidence from a randomized natural experiment*. Journal of
26 Empirical Legal Studies, 7, 403-428.

27 ⁵³ Casey, P., Warren, R., Cheesman, F., & Elek, J. (2012). *Helping courts address*
28 *implicit bias: Resources for education*. Williamsburg, VA: National Center for State
Courts.

⁵⁴ Casey, P., Warren, R., Cheesman, F., & Elek, J. *Helping courts address implicit bias:*
Resources for education. Williamsburg, VA: National Center for State Courts.

1 potential jurors, but it will also allow for self-reflection that will guard against having
2 these biases play a role in the decision-making process.

3 Counsel should be given some latitude in questioning jurors on their implicit biases.
4 As reported by the National Center for State Courts "[s]cientists realized long ago that
5 simply asking people to report their attitudes was a flawed approach; people may not
6 wish or may not be able to accurately do so. This is because people are often unwilling to
7 provide responses perceived as socially undesirable and therefore tend to report what they
8 think their attitudes should be rather than what they know them to be."⁵⁵ In the context of
9 voir dire, this means that counsel should be given the opportunity to explore jurors'
10 implicit biases, such as their emotional reaction to a young African American being
11 charged with a crime and certain assumptions they might make about him or her because
12 of race, or their experiences with young African American men and whether they are
13 afraid of such young men based on their initial perceptions.

14 Studies using mock juries have demonstrated repeatedly that the race of the defendant
15 and the complaining witness are salient factors that affect the jurors' perception and
16 judgment of the facts of the case and evaluation of the testimony.⁵⁶ These studies have
17 shown that the race of a defendant influences the decisions of many criminal juries and
18 that juror bias is often influenced by the specific racial issues involved in a given trial.⁵⁷
19 This is particularly true where the jury is not diverse and does not include members of the
20 same race as the defendant. "The problem of the effect of the racial composition of the
21
22

23 ⁵⁵ *Id.*

24 ⁵⁶ Baldus, D.C., Woodworth, G & Pulaski C.A. Jr. (1990) *Equal justice and the death*
25 *penalty: A legal and empirical analysis*. Boston: Northeastern University Press; Guinther.
26 J. (1988) *The jury in America*. New York: Facts on File Publications; Lynch M. &
27 Haney C. (2000) *Discrimination and instructional comprehension: Guided discretion,*
racial bias, and the death penalty. Law and Human Behavior, 24, 337-358.

28 ⁵⁷ Hans V.P. & Vidmar, N. (1986) *Judging the jury*. New York: Plenum; King, N.J.
(1993) *Postconviction review of jury discrimination: Measuring the effects of juror race*
on jury decisions. Michigan Law Review, 92, 63-130.

1 jury and its verdict is most noticeable when the trial involves a blatantly racial issue."⁵⁸
2 Other studies have found that when descriptions of the crime are identical, white jurors
3 are more likely to vote to convict African American defendants than white defendants
4 and give longer sentences to African American defendants.⁵⁹ Given the numerous
5 studies, it is clear that jurors' negative attitudes regarding defendants of a different race—
6 particularly African Americans—can be ferreted out and overcome through sensitive and
7 probing questions on voir dire.⁶⁰

8 Jury composition affects the outcome of cases because "there is an even more extreme
9 form of attribution error that whites tend to commit when they interpret and judge the
10 behavior of minority group members."⁶¹ This tendency has been coined the "ultimate
11 attribution error" because it is so pervasive and pernicious.⁶² In a recent study that
12 examined the impact of jury racial composition on trial outcomes using felony trials in
13 Florida over a ten year period between 2000-2010, researchers found that juries formed
14 from all-white jury pools convict African American defendants 16% more than white
15 defendants. However, that same study found that this gap in conviction rates is entirely
16 eliminated when the jury pool includes at least one African American member. The
17 findings showed that "the application of justice is highly uneven and raise obvious
18 concerns about the fairness of trials in jurisdictions with a small proportion of African
19 Americans in the jury pool."⁶³ Studies have also shown that diversity of the jury affects

21 ⁵⁸ Fukurai, H., Butler, E.W. and Krooth, R (1993) *Race and the jury: Racial*
22 *disenfranchisement and the search for justice*. New York: Plenum Press.

23 ⁵⁹ Foley, L.A. & Chamblin, M. H. (1982) *The effect of race and personality on mock*
24 *jurors' decisions*, Journal of Psychology, 112, 47-51; Klein, K & Creech. B. (1982) *Race,*
25 *rape and bias: Distortion of prior odds and meaning changes*. *Basic and Applied Social*
26 *Psychology*, 3, 21-33.

27 ⁶⁰ Lynch M. & Haney C., *supra*, *Discrimination and instructional comprehension:*
28 *Guided discretion, racial bias, and the death penalty*. Law and Human Behavior, 24, at
355.

⁶¹ Haney, C. (2004) *Condemning the Other in Death Penalty Trials: Biographical*
Racism, Structural Mitigation, and the Empathetic Divide. De Paul Law Review Vol. 53
Num. 4 p. 1583.

⁶² *Id.* at 1583 *citing*: Anthony Amsterdam & Jerome Bruner, MINDING THE LAW 247
(2000).

⁶³ *Id.*

1 the quality of the deliberations. In San Francisco, where 57% of the persons charged
2 with crimes are African American, African Americans constitute 5.7% of the population
3 and an even smaller percentage of the jury pool.⁶⁴ "Compared to all-white juries, racially
4 mixed juries tended to deliberate longer, discuss more case facts, and bring up more
5 questions about what was missing from the trial."⁶⁵

6 Thus, it is critically important that, in a case involving the accusation of a serious
7 crime of violence, coupled with the racial difference between the complaining witness,
8 who is Asian, and the defendants, who are African American, both the defense and the
9 prosecution are given sufficient time to voir dire the jury on the issues of race and racism,
10 both explicit and implicit, thereby enabling the jurors to express their feelings and
11 attitudes towards the defendant⁶⁶, the charges in this case⁶⁷, defendant's ethnicity and
12 other issues related to bias they may feel.

13 **3. Conclusion**

14 For the foregoing reasons, Defendant requests up to 90 minutes with the first 24
15 jurors, and 45 minutes for each group of jurors thereafter.

16 Counsel will be respectful of the court's time and the prospective jurors' attention.
17 Counsel does not seek a limitless voir dire, but rather requests that counsel be given leave
18 to question each juror in both a meaningful and efficient manner.

19 Dated:

Respectfully Submitted

21 _____
JEFF ADACHI
22 Public Defender
23 Attorney for MICHAEL SMITH

24 _____
25 ⁶⁴ Anwar, S., Bayer, P & Hjalmarsson, R. (2010) Impact of Jury Race in Criminal Trials,
The Quarterly Journal of Economics, Oxford Journals.

26 ⁶⁵ Samuel R. Sommers, Race and Juries: The Effects of Race-Salience and Racial
27 Composition on Individual and Group Decision-Making (2002) (unpublished Ph.D.
28 dissertation, University of Michigan) (on file with the Chicago-Kent Law Review).

⁶⁶ *People v. Simon* (1927) 80 Cal.App. 675, 685.

⁶⁷ *People v. Harrison* (1910) 13 Cal.App. 555, 558.

Proof of Service

I, the undersigned, say:

I am over eighteen years of age and not a party to the above action. My business address is 555 Seventh Street, San Francisco, California 94103.

On _____, I personally served copies of the attached on the following:

ATTN:
San Francisco District Attorney, 2nd Floor
850 Bryant Street
Francisco, CA 94103

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____ in San Francisco, California.

1 Jeff Adachi, SBN #121287
Public Defender
2 City and County of San Francisco
Matt Gonzalez
3 Chief Attorney
555 Seventh Street
4 San Francisco, CA 94103
(415) 553-9520
5 jeff.adachi@sfgov.org
Attorneys for Michael Smith
6

7 **Superior Court of the State of California**
8 **County of San Francisco**

9 **People of the State of**
10 **California,**

11 Plaintiff,

12 vs.

13 **Michael Smith,**

14 Defendant.
15

Court No.: 16013940

Motion to Quash Jury
Venire on Unconstitutional
Race Exclusion

Date:
Time:
Dept:

16 Defendant Michael Smith moves to dismiss the entire venire for failure to
17 reflect a fair cross-section of the community. The issue is:

18 To make a prima facie challenge, the defense must show: 1) exclusion
19 of a distinctive group; 2) failure of the panel to reflect a fair and
20 reasonable representation of that group; and 3) that under-
21 representation is due to systematic exclusion.¹ Once shown, the
22 prosecution must provide a rational basis for the disparity.² Here, the
23 defense shows that by drawing from San Francisco voter registration
24 and California DMV records without supplementation, there is a
25 systemic discrimination of African Americans. Without a rational basis
26 to exclude these groups, must this Court dismiss the venire?

27 ¹ *Duren v. Missouri* (1979) 439 U.S. 357, 364. See also *People v. Jones* (1972) 25
28 Cal.App.3d 776 (murder conviction reversed, failure to allow defense to present
evidence to substantiate his challenge to venire).

² *Duren, supra*, at 368.

1 The motion will be based on this notice, all the pleadings and files in this case,
2 the memorandum of points and authorities filed herewith in support of the
3 motion, the Declarations of _____ and other
4 motions to be filed in support of the motion, and on evidence and oral argument
5 to be heard at the time this motion is scheduled to be heard.

6
7 **Memorandum of Points and Authorities**
8 **Introduction**

9 **1. Bias and false 911 call leads to BART confrontation.**

10 Michael Smith entered not-guilty pleas to a Complaint charging him with six
11 counts of battery against BART officers (Pen. Code, §243(b)) and one count of
12 resisting arrest (Pen. Code, §148(a)).³

13 Smith is a 23-year old, African American man who came to the attention of
14 BART police after being antagonized by a white man, using racial slurs, while
15 riding on a BART train with his pregnant girlfriend. A false 911 call accused Smith
16 of armed robbery leading to the deployment of BART officers, resulting in a six-
17 on-one confrontation with injuries to Smith.

18 **2. The jury venire fails to reflect the 5.7% African American**
19 **population in San Francisco.**

20 In this case _____ jurors were listed on the master list of jurors selected to
21 serve on this case. Only ____ jurors were African American. Thus, only ____ % of
22 the master list of jurors selected to serve on this case were African American,
23 which is less than the 5.7% African American population in San Francisco.⁴

24
25
26
27 ³ Exhibit A, Complaint.

28 ⁴ See Census information: <http://www.census.gov/quickfacts/table/AGE115210/06075>.

1 Currently, jurors in San Francisco are selected from the DMV and Voter
2 Registration lists.⁵ Reliance on only these lists significantly under-represents
3 potential African American jurors, hence violating Smith’s right to a
4 representative cross-section of the community under the federal and state
5 constitutions.⁶

6 Though a violation of this right to a representative cross-section is a
7 substantive violation requiring no showing of individualized prejudice,⁷ here,
8 Smith’s defense is particularly affected because of the prevalence and existence of
9 racism — both conscious (explicit) and unconscious (implicit) — and the inability
10 of many jurors to understand the culture and experience of African-Americans, or
11 perceive or objectively judge persons manifesting personality and cultural
12 differences from the predominantly white culture.

13 **Argument**

14 **1. Defendant is entitled to a jury drawn from a** 15 **representative cross-section of this community.**

16 “The right to trial by a jury drawn from a representative cross-section of the
17 community is guaranteed equally and independently by the Sixth Amendment to
18 the federal Constitution and by article I, section 16, of the California

19
20 ⁵ According to the San Francisco Superior Court website: “Both the voter
21 registration and motor vehicle records are used as source lists for prospective
22 jurors. Names are randomly selected from the countywide population by
23 computer.” The advisement further states that “[t]he Court receives its data from
these two sources each year in October.” (See [http://www.sfsuperiorcourt.org/
divisions/jury-services](http://www.sfsuperiorcourt.org/divisions/jury-services).)

24 ⁶ For the purposes of this challenge, in the case of the trial jury, the term “pool”
25 refers to the master list of eligible jurors, from which prospective jurors are
26 summoned. The term “venire” is the group of prospective jurors summoned from
that list and made available after excuses and deferrals have been granted, for
assignment to a panel. A “panel” is the group of jurors assigned to a court, from
which a jury will be selected to try a particular case.

27 ⁷ See *People v. Bell* (1989) 49 Cal.3d 502, 564, citing *Peters v. Kiff* (1972) 407
28 U.S. 493, 503-504 (Broussard, J., dissenting); *Jones, supra*, 25 Cal.App.3d at
787.

1 Constitution.”⁸ The constitutional goal mandated in *Wheeler* is to obtain a jury
2 “that is as near an approximation of the ideal cross-section of the community as
3 the process of random draw permits.”⁹ The federal and state jury trial guarantees
4 are coextensive and the analysis for deciding such a claim is identical.¹⁰ The
5 Equal Protection clause of the Fourteenth Amendment to the United States
6 Constitution also requires that a jury must be truly representative of the
7 community and prohibits systematic exclusion of any racial group during the
8 selection process.¹¹

9 The jury trial guarantee mandates that the pools from which juries are drawn
10 must not systematically exclude distinctive groups in the community.¹² African-
11 Americans are a cognizable group for fair cross-section analysis.¹³ The relevant
12 community for this analysis is the judicial district in which the case is tried, here
13 — San Francisco County.¹⁴

14 **2. Smith demonstrates a prima facie violation of the fair** 15 **cross-election requirement under *Duren*.**

16 *Duren* provides the three-factors required in making a prima facie showing for
17 a violation of the right to a fair representation: (1) the excluded group is a
18 “distinctive” one in the community; (2) that the representation of this group in
19 venires from which juries are selected is not fair and reasonable in proportion to
20 the number of such persons in the community; and (3) that this

21 ⁸ *Taylor v. Louisiana* (1975) 419 U.S. 522; *People v. Wheeler* (1978) 22 Cal.3d
22 258, 272.

23 ⁹ *Wheeler*, *supra*, at 299.

24 ¹⁰ *People v. Bell* (1989) 49 Cal.3d 502, 525, n. 10.

25 ¹¹ *Smith v. Texas* (1940) 311 U.S. 128.

26 ¹² *People v. Mattson* (1990) 50 Cal.3d 826, 842.

27 ¹³ *People v. Harris* (1984) 36 Cal.3d 36, 51; *Whitus v. Georgia* (1967) 385 U.S.
28 545, 549-551.

¹⁴ *Williams v. Superior Court* (1989) 49 Cal.3d 736, 742-746.

1 underrepresentation is due to systematic exclusion of the group in the jury
2 selection process.¹⁵ Once the prima facie showing is established, the burden shifts
3 to the state to show justification and explanation for the disparity.¹⁶

4 In *Duren*, the Court found an impermissible systematic exclusion of women in
5 jury venires. During a one-year period, less than 15% of the venires were
6 composed of women despite women making up 54% of the population.¹⁷ In
7 examining the jury selection process, the Court identified that the first stage of
8 the selection process, summonsing, did not create a disparity; but in returning
9 the questionnaire, women were allowed to elect not to serve.¹⁸ And, should a
10 prospective woman juror not respond to a summons, the county presumed an
11 exemption.¹⁹ Finding this process resulted in systemic exclusion of women, the
12 Court held the state interest, assuring the availability of child care, was not a
13 constitutionally-acceptable basis for the jury exemption.²⁰

14 Though a group was identified and exempted under *Duren*, intentional
15 discrimination is not required to prove systematic exclusion. But where the
16 selection criteria are group-neutral, the defense must show more than statistical
17 disparity — by identifying some aspect of the manner in which those criteria are
18 being applied that is: (1) the probable cause of the disparity, and (2)
19 constitutionally impermissible.²¹

22 ¹⁵ *Duren*, *supra*, 439 U.S. at 364. See also *Bell*, *supra*, 49 Cal.3d at 525.

23 ¹⁶ *People v. Sanders* (1990) 51 Cal.3d 471, 491.

24 ¹⁷ *Duren*, *supra*, at 366-367.

25 ¹⁸ *Id.*, at 361, 366.

26 ¹⁹ *Id.*, at 366.

27 ²⁰ *Id.*, at 370.

28 ²¹ *People v. Bell*, *supra*, 49 Cal.3d at 524.

1 **A. The *de minimis* African-American representation on jury venires**
2 **violates the first two-prongs of *Duren*.**

3 Here, the San Francisco jury selection process excludes the distinctive group of
4 African-Americans.²²

5 Because the San Francisco Jury Commissioner does not keep any statistics
6 concerning the racial make-up of the jury venire, Smith offers a number of
7 declarations, surveying attorneys who have handled cases over the past six months.
8 This survey shows that in many jury trials — with panels ranging from 60-120,
9 there were either none or few African American jurors.²³

10 In the following cases, there were *no* prospective African-American jurors:

- 11 • In the case of *People v. Eric Jones*, SCN 225785, out of a venire of 120
12 jurors, there were *no* African American jurors;
- 13 • *People v. Gary Shukman*, Court No. 16004187;
- 14 • *People v. Jose Gonzalez*, Court No. 16000074;
- 15 • *People v. Anthony Dean*, Court No. 16006295;
- 16 • *People v. Neil Omaque*, Court No. 15023270; and
- 17 • *People v. Luis English*, Court No. 16013934.

18 In the matter of one particular case, there was *one* African-American
19 candidate:

- 20 • In *People v. Jamie Terrell*, SCN 225292, out of 103 jurors called into the
21 venire, but only *one* prospective African American juror.

22 This disparity — the lack of any significant African-American presence on jury
23 venires in the San Francisco County — is not fair and reasonable under any
24 measure. Though courts have varied in their approach in measuring disparity,
25 whether under an “absolute disparity” test, or “statistical (comparative)”
26

27 ²² *Harris, supra*, 36 Cal.3d at 51.

28 ²³ See Exhibit “A”: Declarations of Counsel.

1 significance” measure, San Francisco County here has failed to provide a fair
2 cross-section in the venires.

3 Though there is no bright-line, fixed numerical percentage that rises to a
4 constitutional violation, the dissenting opinion in the 1989 *Bell* decision found a
5 5% disparity significant.²⁴ There, in raising a challenge to the Contra Costa
6 County venires at the time of his jury trial, Bell showed that African-Americans
7 comprised approximately 8% of the total population in the county, but only
8 slightly over 3% of prospective jurors on Contra Costa County venires.

9 The *Bell* Court did not reach the issue of whether this 5% absolute disparity
10 was of statistical significance because it found that Bell failed to show a
11 systematic exclusion under prong 3 of *Duren*²⁵ — but, the well-reasoned
12 dissenting opinion by Justice Broussard found this disparity significant, *in and of*
13 *itself*, to show an unconstitutional systematic exclusion.²⁶

14 Here, the San Francisco County disparity is much greater than of Contra
15 Costa’s in *Bell*: One African-American prospective juror for every 600 persons in
16 each venire.²⁷ If using an absolute disparity test, the difference is close to 5.7%.
17 And, where there is an *almost 0%* representation in the venires, this number is
18 constitutionally and statistically significant under either a comparative or
19 absolute measure.

20
21
22
23 ²⁴ *Bell, supra*, 49 Cal.3d at 565-566 (Broussard, J., dissenting).

24 ²⁵ *Id.*, at 527.

25 ²⁶ *Id.*, at 565-566 (Broussard, J., dissenting). *Cf. People v. Buford* (1982) 132
26 Cal.App.3d 288, 297 (applying statistical analyst approach to same data point in
27 *Bell*, First Appellate District found a Sixth Amendment violation in the exclusion
of African Americans in the venire).

28 ²⁷ Smith rounds-off 100 jurors for each of the six jury cases listed here: *Jones*,
Shukman, *Gonzalez*, *Dean*, *Omaque*, and *Terrell*.

1 **B. The jury selection process creates a systemic exclusion of African**
2 **Americans.**

3 Having shown the first two prongs of *Duren*, Smith now explains the systemic
4 exclusion and the failure of the San Francisco Superior Court and the jury
5 commissioner to remedy the issue to meet prong 3 — cause of the disparity, being
6 constitutionally impermissible.

7 ***(1) The exclusive use of the master calendar list using limited sources***
8 ***fails to include African American citizens.***

9 California's Code of Civil Procedure codifies the fair cross-section
10 requirement. The county jury commissioner has the affirmative duty to make
11 sure that “all qualified persons have an equal opportunity . . . to be considered for
12 jury service in the state[.]”²⁸ Section 197 requires that a random process select
13 persons for jury service from a source “inclusive of a representative cross-section
14 of the population of the area served by the court.” Sources may include customer
15 mailing lists, telephone directories, utility company lists, DMV lists of license
16 holders or identity card holders, and the list of registered voters²⁹.

17 The reason for the reference to other source lists in the Code is obvious: some
18 lists will under include certain segments of our communities. For example,
19 minorities register to vote in lower percentages than do whites statewide. Because
20 of their lower economic position minority residents of the county own cars, keep
21 insurance and maintain current driver’s licenses in much lower numbers than do
22 non-minority residents of the county. Underrepresented members of the
23 community not on traditional source lists may be included in other sources, for
24 example utility company lists. The law does not preclude the use of other source
25 lists to supplement the current use of the voter registration and DMV list of
26 license or identification card holders.

27 ²⁸ Code Civ. Proc., § 191.

28 ²⁹ Code Civ. Proc., §197, subds. (a), (b).

1 But here, San Francisco County exclusively pulls prospective jurors from
2 California DMV records and the San Francisco voter registration list — having the
3 effect of African-American exclusion.

4 A similar cause and discriminatory effect was seen in Los Angeles County in
5 the 1980s. In the 1984 *Harris* decision, Harris’s conviction was reversed after the
6 defense successfully challenged the Los Angeles County (Long Beach Courthouse)
7 selection process which pulled prospective jurors from only DMV records.³⁰
8 Harris demonstrated evidence that there was a large and increasing proportion of
9 the general population that failed to register to vote, and that the proportion of
10 minorities failing to register was larger than that for the general population.³¹

11 Similarly here, by limiting the pool of potential jurors, San Francisco County
12 has continued to follow a selection process that excludes African-American
13 citizens. And, it is a systemic exclusion because San Francisco County has been
14 on notice of the chronic under-response of minorities to jury questionnaire
15 mailings and jury summonses, but has not developed any changes in the jury
16 summons process.

17 ***(2) On notice for over twenty-five years, San Francisco County has***
18 ***ignored implementing any solutions to group under-***
19 ***representation.***

20 For over three decades, the California Judicial Council has identified access
21 and fairness in the judicial system as its number-one priority. In March of 1991,
22 then California Chief Justice Lucas formed and appointed as advisory committee
23 to (1) study the treatment of racial and ethnic minorities in the state courts, (2)
24 ascertain public perceptions of fairness of lack of fairness in the judicial system,
25 and (3) make recommendations on reforms and remedial programs.³²

26 ³⁰ *Harris, supra*, 36 Cal.3d at 52.

27 ³¹ *Ibid*

28 ³² Final Report of the California Judicial Council Advisory Committee on Racial
and Ethnic Bias in the Courts (1997), at pages 1-2.

1 The advisory committee joined 10 other state task forces and commissions
2 and numerous professional associations and organizations in its effort to
3 investigate racial and ethnic bias in state court systems.³³ The committee spent
4 nearly five years conducting public hearings, opinion surveys, demographic
5 surveys and other studies in furtherance of the committee's mandate.

6 While the committee found that the rules were structured with the goal of a
7 represented and unbiased jury composition, “substantial numbers of minorities
8 are convinced that their groups are not represented fairly on trial juries” and that
9 “a jury that their group is unrepresented is incapable of judging their cases
10 fairly.”³⁴ And, citing a Massachusetts commission’s finding that “[a] jury of
11 diverse minority and ethnic composition is more likely to make decisions that are
12 free of bias and prejudice because the biases and prejudices of individual jurors
13 will be challenged and moderated by their peers” the committee cited numerous
14 examples of reported instances of racial bias where the juries were not
15 representative of the party being tried.³⁵

16 Evidence showed that the jury pool is unrepresentative in part because the
17 Department of Motor Vehicles list excludes those with suspended driver's
18 licenses as well as those without licenses.³⁶ In its conclusions, the committee
19 found that because juror lists compiled from only voter and DMV lists may not be
20 representative, other sources should be considered to augment the jury pool. The
21 committee recommended that jury commissioners compile juror lists from *utility*
22 *subscriber lists* and *other sources* to ensure diversity.³⁷

23
24

³³ Final Report, *supra*, at 2.

25 ³⁴ *Ibid.*

26 ³⁵ *Id.* at 192.

27 ³⁶ *Id.* at 193.

28 ³⁷ Final Report, *supra*, at 193.

1 Twenty-five years after the release of the report, San Francisco's Jury
2 Commissioner has done nothing to comply with its recommendations to diversify
3 jury panels. It has not used utility subscriber lists or other sources to augment the
4 jury pool, and the result has been a gross under-representation of African-
5 Americans. The failure to rectify these known issues is constitutionally
6 impermissible under *Duren*.

7
8 **(3) *Statistics demonstrate the need to augment the jury pool list to capture African-Americans and lower-income San Franciscans.***

9 Since 1991, the population of African-American population in San Francisco
10 has decreased from 10% to 6.1% in 2010, according to the latest available census
11 count.³⁸ Various reports and studies have found that the net migration of African-
12 Americans between 2010-2014 at 4.6%, nearly four times higher than any other
13 ethnic group, due to gentrification, skyrocketing rents and the lack of African-
14 American neighborhoods.³⁹ The out migration disparity is even more dramatic
15 for African-Americans between the ages of 22-49, where 9.9% in this age group
16 has left the city, compared to 1.6% for whites, 2.9% Asian, 1.7% Latino and 1.3%
17 Other.⁴⁰ This has, of course, reduced the numbers of potential African-American
18 jurors called for jury duty.

19 Where the African-American population is now at 5.7%, however, it is that
20 much more important to incorporate other lists to capture members of that group
21 for jury selection. And, despite the migration — out of a group of seventy
22 potential jurors selected, it would nonetheless be expected that there would be at
23 least four African American jurors (5.7%). But, as established by the declarations
24

25 ³⁸ *The African American Exodus from San Francisco*, Forbes Magazine, May 11,
2016.

26 ³⁹ *Ibid*.

27 ⁴⁰ *Ibid*; see also *The Loneliness of Being Black in San Francisco*, The New York
28 Times, July 20, 2016 and *African American Citywide Historic Context Statement*, January 2016.

1 of attorneys who have recently tried cases in the San Francisco courts — often
2 there is *not one single* African American in a jury venire called to serve on a
3 particular case.

4 *(a) The flaw of relying on DMV records is proven by statistical data.*

5 Despite what has been known for twenty-five years, San Francisco continues
6 to rely on DMV records which is a large part of the problem. It excludes those
7 potential jurors who have lost their licenses — generally caused by poverty and
8 the inability to pay fines. According to a report issued in April 2016 by the
9 Lawyers' Committee for Civil Rights and other legal groups, African-Americans
10 account for nearly half of all people arrested for not paying traffic-related fines or
11 fees, which often results in a suspended license.⁴¹

12 The report found large racial disparities among those police arrest for not
13 paying a traffic ticket, failing to appear in court regarding a traffic infraction, or
14 driving with a suspended license in San Francisco. Just under 50% of people
15 arrested for not paying a traffic ticket or failing to appear in court for a traffic
16 infraction were African-American, and that of 9,300 people arrested for driving
17 with a suspended license in San Francisco, 46% were African Americans. The
18 report's findings for San Francisco were based on data from the city's Sheriff's
19 Department and the California Department of Motor Vehicles.⁴²

20 Moreover, the report found that lower-income San Franciscans were more
21 likely to have their licenses suspended because they cannot afford to pay the
22 fines.⁴³ The report found a direct correlation between suspensions and poverty
23 indicators and with race. The highest suspension rates are found in the poorest
24 neighborhoods, and neighborhoods with higher percentages of Black or Latino

25
26 ⁴¹ *Stop, Fined and Arrested*, San Francisco County, pages 15-19. The full report
can be found at <http://ebclc.org/backontheroad>.

27 ⁴² *Ibid.*

28 ⁴³ *Id.*, at 15-19.

1 residents. For example, in the Bay View/Hunter's Point neighborhood in San
2 Francisco, has a relatively high rate of poverty (23.5%), the highest percentage of
3 Black residents in San Francisco (35.8%) and a suspension rate of 6.7%, more
4 than three times the state average. By contrast, the Marina District, has a
5 substantially lower poverty rate (5.9%), a low percentage of Black residents
6 (1.5%) and a suspension rate five times below the state average (0.4%).⁴⁴

7 Thus, by using the DMV lists in order to determine who can serve on jury
8 duty, the Jury Commissioner has allowed the exclusion of African Americans who
9 are the victims of discrimination in the discriminatory enforcement of traffic and
10 suspended licenses laws. Given the 2010 census population of African Americans
11 at 45,500, excluding African Americans because they have a suspended license or
12 unpaid traffic finds could account for nearly 10% of all jury-eligible African
13 Americans in San Francisco.

14 *(b) Voter registration lists historically under-represent the African-American*
15 *population of eligible jurors.*

16 With regard San Francisco's reliance on voter rolls, this also works to exclude
17 African-Americans. A 2005 study by Diamond & Rose found that lower-income
18 individuals and racial minority groups tend to be under-represented on such
19 lists.⁴⁵ And as far back as 1997, researchers noted the flaw in relying on voter
20 registration lists because they significantly under-represent racial minorities,
21 people under age 40, people with lower income and less education, blue-collar
22 workers and the underemployed.⁴⁶

23 Here, because there is no record as to the number African Americans who are
24 registered to vote in San Francisco, courts have no information about the race,

25 ⁴⁴ *Stop, Fined and Arrested, supra*, at 1.

26 ⁴⁵ Shari Seidman Diamond & Mary R. Rose, *Real Juries*, Annu.Rev.Law Soc. Sci,
27 1:255-84 (2005).

28 ⁴⁶ Kairys, D., J. B. Kadane, and J. P. Lehoczky (1977). "Jury Representativeness:
A Mandate for Multiple Source Lists," 65 *California Law Review* 776.

1 ethnicity or socioeconomic status of the people who are receiving and responding
2 to their jury summons. However, the historical disenfranchisement of the African
3 American vote in the United States is well-documented — and anecdotal
4 observation and empirical research suggests serious limitations in creating a
5 diverse jury pool.

6 One form of anecdotal evidence is when there is an absence of a particular
7 minority group when their population percentage in the county would be
8 expected to be represented in the jury venire. According to the declarations of
9 public defenders and attorneys, a recurring phenomenon in San Francisco are
10 jury panels of 60-80 potential jurors with few or no African American members.

11 The defense has also retained nationally known jury expert Professor Sam
12 Sommers to review the current procedures of the San Francisco Jury
13 Commissioner and the San Francisco Superior Court. After reviewing the current
14 research in this area, and examining said procedures, Professor Sommers
15 concluded that the failure to supplement the list of eligible voters contributes to
16 the underrepresentation of African-Americans.⁴⁷

17 In sum, San Francisco's exclusive reliance on two lists, despite known
18 literature of the under-representation of African-American citizens, has resulted
19 in a systemic exclusion from jury venires. Though many states have taken steps to
20 address the under-representation of minorities by supplementing the voter
21 registration and Department of Motor Vehicles' list with other lists, as the
22 California Judicial Council Advisory Committee on Racial and Ethnic Bias in the
23 Courts recommended⁴⁸ — San Francisco County has done nothing to ensure a fair
24 cross-section of the community.

25 ⁴⁷ Exhibit B, Declaration of Professor Sam Sommers.

26 ⁴⁸ For example, New York combines lists of voters, drivers, income tax payers,
27 and welfare and unemployment compensation recipients. (See Ronald Randall,
28 James W. Woods and Robert G. Martin, "*Racial Representation of Juries: An
Analysis of Source List and Administrative Effects on the Jury Pool*," Justice
System Journal 29, no. 71:756 (2008).)

1 Smith has made a prima facie showing under *Duren*, and the burden shifts to
2 the prosecution to justify the disparity and offer a rational basis to survive
3 Smith's challenge to the panel.

4 **3. Diversity and balanced racial composition of juries result**
5 **in more just outcomes and an improved public perception**
6 **of the justice system.**

7 The need for, and benefits of, a representative venire are immeasurable. Here,
8 the absence of African-American citizens not only offends the Sixth Amendment,
9 but it also affects Smith's right to a fair trial given the running racial subtext
10 behind his arrest.

11 In 1972, Justice Thurgood Marshall expertly explained the need for diverse
12 juries: "When any large and identifiable segment of the community is excluded
13 from jury service, the effect is to remove from the jury room qualities of human
14 nature and varieties of human experience, the range of which is unknown and
15 perhaps unknowable. . . . [I]ts exclusion deprives the jury of a perspective on
16 human events that may have unsuspected importance in any case that may be
17 presented."⁴⁹

18 More recently, the American Bar Association made the case for diverse juries
19 as confirming the system be fair and impartial to the defendant; impact the
20 public's faith in the jury system; and minority presence on the jury allows the
21 group to understand and appreciate the different life experiences that different
22 racial identities have within the criminal justice system.⁵⁰

23 Professor Sam Sommers has performed extensive research in this area, and
24 has demonstrated that increasing the proportion of African American jurors on a
25 jury changes the way that white jurors view a case. In 2006, Sommers conducted

26 ⁴⁹ *Peters, supra*, 407 U.S. at 503-504.

27 ⁵⁰ [http://www.americanbar.org/groups/litigation/committees/diversity-](http://www.americanbar.org/groups/litigation/committees/diversity-inclusion/news_analysis/articles_2015/lack-of-jury-diversity-national-problem-individual-consequences.html)
28 [inclusion/news_analysis/articles_2015/lack-of-jury-diversity-national-problem-](http://www.americanbar.org/groups/litigation/committees/diversity-inclusion/news_analysis/articles_2015/lack-of-jury-diversity-national-problem-individual-consequences.html)
[individual-consequences.html](http://www.americanbar.org/groups/litigation/committees/diversity-inclusion/news_analysis/articles_2015/lack-of-jury-diversity-national-problem-individual-consequences.html)

1 a mock jury study that examined the effects of a diverse jury composition on the
2 performance and decision-making of white mock jurors.⁵¹ The results of that
3 study found that African American mock jurors were less likely to vote to convict
4 the defendant than were white mock jurors. Moreover, differences were also
5 observed within the groups of white respondents, as white mock jurors on
6 racially-diverse juries were significantly less likely to vote to convict the
7 defendant than were those white mock jurors on all-white juries. And, racially-
8 diverse mock juries were more thorough in their deliberations on the case, made
9 fewer inaccurate statements regarding the facts of the case, and were more
10 willing to discuss potentially controversial issues such as racial profiling.

11 Not only does this study suggest that as the proportion of African American
12 jurors increases the likelihood of conviction decreases, but it also demonstrates
13 the potential for a jury's racial composition to influence its deliberation process
14 and content. Professor Sommers concludes that the systematic under-
15 representation of African-Americans in the jury pool undermines the fairness of a
16 trial.⁵²

17 Here, Smith respectfully requests the Court protect his right to a fair trial by
18 dismissing the venire to ensure a more balanced representation from the
19 community — not only mandated under the law (*Duren*) but also compelled by
20 scientific data.

21 **Conclusion**

22
23 The jury venire fails to represent a fair cross-section of San Francisco County
24 because it relies on two lists which have the effect of excluding the group of

25 ⁵¹ Sommers, S. R. (2006). On racial diversity and group decision-making:
26 Identifying multiple effects of racial composition on jury deliberations. *Journal*
27 *of Personality and Social Psychology*, 90, 597-612.

28 ⁵² See Exhibit "B": Declaration of Professor Sam Sommers.

1 eligible African-American residents. The absence of African-American citizens
2 and the failure of San Francisco County to ensure a fair representation rises to a
3 violation of Smith's Sixth Amendment rights, and offends his rights to due
4 process and equal protection under the law. Barring a rational justification —
5 none exists here — this Court should dismiss the venire.

6 Dated: August 24, 2016

7 Respectfully Submitted
8
9

10 _____
11 Jeff Adachi
12 San Francisco Public Defender
13 Attorney for Michael Smith

14 +
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Proof of Service

I say:

I am over eighteen years of age and not a party to the above action. My business address is 555 Seventh Street, San Francisco, California 94103.

I personally served copies of the attached on the following:

San Francisco District Attorney, 3rd Floor
850 Bryant Street
San Francisco, CA 94103
Attn: Dane Reinstedt, ADA

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____ in San Francisco, California.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8

2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8

4
5
6
7
8
9
0
1
2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8

5
6
7
8
9
0
1
2
3
4
5
6
7
8
9
0
1

22
23
24
25
26
27
28

1 board of *Law and Human Behavior*, the flagship journal for the empirical study
2 of psycholegal issues, including jury decision-making. Since 2009, I have served
3 on the editorial board of *Psychological Science*, one of the leading journals in
4 general psychology research; as of 2012 I have been a member of the editorial
5 board of *Journal of Personality and Social Psychology*. Finally, from 2012-2015
6 I served as associate editor for *Journal of Experimental Social Psychology*.
7 These editorial positions require and enable me to keep abreast of the latest
8 developments in my fields of study.
9

11 3. My teaching responsibilities include courses in Research Methods,
12 Social Psychology, Introductory Psychology, Psychology and Law. In 2007, I
13 received the Lerman-Neubauer Prize for Outstanding Teaching and Advising at
14 Tufts. In 2009, I was named the recipient of the Gerald R. Gill Professor of the
15 Year Award, given annually to one professor on campus by the Tufts Student
16 Senate.
17

19 4. I have testified as an expert witness six times on research related to
20 the influence of race on jury decision-making and the psychology of intergroup
21 relations. In two of these cases (one in New Hampshire and one in Oregon), I
22 testified in pre-trial hearings regarding racial disparities in the outcomes of
23 capital murder trials. In two other cases I testified in post-trial hearings (one in
24 Massachusetts and one in Pennsylvania) regarding allegations of racially biased
25 comments made by individuals during the course of their jury service; I was
26 asked to testify about scientific research regarding racially-charged language use.
27
28

1 In the fifth case I testified in a post-trial hearing in North Carolina regarding
2 racial disparities in peremptory challenge use in capital jury selection; I was
3 asked to testify about scientific research regarding how informative self-report
4 data are when it comes to identifying the actual influence of race on legal
5 perceptions and judgments. In the sixth case I testified in a post-trial hearing in
6 Michigan after the state discovered that a certain number of zip codes had been
7 inadvertently omitted from jury duty summonses; I was asked to testify about
8 scientific research regarding how a jury's racial composition affects its decision-
9 making tendencies. In those cases, as in the present case, my relevant expertise
10 regarding the influence of race on jury decision-making and the psychology of
11 intergroup relations was based on my record of research, teaching, membership
12 in professional scientific organizations, and editorial work for leading journals in
13 the field.
14
15
16
17

18 **II. ASSIGNMENT AND SUMMARY OF EXPERT OPINION**

19 5. I have been contacted by attorney Jeff Adachi of the San Francisco
20 Public Defender's office and asked to prepare an affidavit detailing my expert
21 opinion on the nature of the scientific research literature regarding the
22 importance of diversity in jury pools and the relationship between a jury's racial
23 composition and the outcome of the case. Mr. Adachi also asked me to review the
24 current practices of the Jury Commissioner of the San Francisco Superior Court
25 and offer an opinion as to whether the Jury Commissioner's use of the voter rolls
26 and DMV list in identifying and summoning potential jurors is likely to result in
27
28

1 lower-income individuals and racial minority groups tend to be underrepresented
2 on the San Francisco jury venire.

3 **III. THE JURY COMMISSIONER'S USE OF THE VOTER ROLLS**
4 **AND DEPARTMENT OF MOTOR VEHICLES LIST IN IDENTIFYING**
5 **AND SUMMONING POTENTIAL JURORS**

6
7 6. Under Congress' 1968 Jury Selection and Service Act, the common
8 technique for creating such a list of prospective jurors in the United States has
9 become drawing from voter registration records. According to the San Francisco
10 Superior Court website, in San Francisco, the Jury Commissioner selects
11 potential jurors from the combined Department of Motor Vehicle and the Voter
12 Registration lists.
13
14

15 7. I am familiar with the Report of the California Judicial Council
16 Advisory Committee on Racial and Ethnic Bias in the Courts, which was
17 published in 1997. The committee was formed in 1991 by former Chief Justice
18 Malcolm Lucas to (1) study the treatment of racial and ethnic minorities in the
19 state courts, (2) ascertain public perceptions of fairness or lack of fairness in the
20 judicial system, and (3) make recommendations on reforms and remedial
21 programs.¹ The advisory committee joined 10 other state task forces and
22 commissions and numerous professional associations and organizations in its
23
24
25
26
27

28 ¹ Final Report of the California Judicial Council Advisory Committee on Racial and Ethnic Bias
in the Courts (1997), pages 1-2.

1 effort to investigate racial and ethnic bias in state court systems.² The committee
2 spent nearly five years conducting public hearings, opinion surveys, demographic
3 surveys and other studies in furtherance of the committee's mandate. In
4 addition, the committee hired consultants to conduct literature surveys and
5 report on the effect of jury composition on jury verdicts and the effect of race and
6 ethnicity on sentencing decisions.

8 8. One of the areas of focus was the jury system, and the committee
9 devoted an entire chapter of the report to their study of this subject, beginning its
10 analysis with the statement that "the integrity of the jury system is a matter of
11 great importance."³ The committee then noted that "if the jury trial --- especially
12 the need for a representative jury --- is not taken seriously, citizens may
13 reasonably believe that the justice system merely gives lip service to these
14 democratic principles."⁴ While the committee found that "[t]he rules governing
15 jury composition are structured to make them represented and unbiased,
16 "substantial numbers of minorities are convinced that their groups are not
17 represented fairly on trial juries" and that "a jury that their group is
18 unrepresented is incapable of judging their cases fairly."⁵

25 _____
² *Id.* at p. 2.

26 ³ *Id.* at p. 190.

27 ⁴ *Id.* at p. 191.

28 ⁵ *Ibid.*

1 Citing a Massachusetts commission's finding that "[a] jury of diverse
2 minority and ethnic composition is more likely to make decisions that are free of
3 bias and prejudice because the biases and prejudices of individual jurors will be
4 challenged and moderated by their peers" the committee cited numerous
5 examples of reported instances of racial bias where the juries were not
6 representative of the party being tried.⁶

7
8 The committee cited testimony that "the jury pool is unrepresentative in
9 part ... because the Department of Motor Vehicles list excludes those with
10 suspended driver's licenses as well as those without licenses."⁷ In its conclusions,
11 the committee found that "[j]uror lists compiled from voter and Department of
12 Motor Vehicle lists only may not be representative," and that "other sources
13 should be considered to augment the jury pool." The committee then
14 recommended that "Jury commissioners compile juror lists from utility
15 subscriber lists and other sources, in addition to the voters' and driver's license
16 lists, to ensure that diverse populations are included in jury panels."

17
18 9. Anecdotal observation and empirical research suggest that reliance on
19 voter rolls and other public records may cause serious limitations in creating a
20 diverse jury pools. For example, Diamond & Rose (2005) found that lower-
21 income individuals and racial minority groups tend to be underrepresented on
22

23
24
25
26
27

⁶ *Id.* at 192.

28 ⁷ *Id.* at 193.

1 such lists. As far back as 1997, researchers who studied the use of source lists
2 found that “the failure of the courts to formulate and enforce appropriate
3 standards for source lists has confused issues and eroded the constitutionally
4 mandates representativeness principle.” That study found that “voter
5 registration lists significantly underrepresent racial minorities, people under age
6 40, people with lower income and less education, blue-collar workers and the
7 underemployed.” And “Lists chosen to supplement the voter registration list
8 should compensate for these deficiencies. Data from various jurisdictions
9 indicate that voter registration lists combined with licensed driver, public
10 assistance and unemployment lists generally will provide a representative,
11 inclusive jury source list.”⁸

15 10. Many states, including California, do not track the number of racial
16 minorities who are on the jury lists. Consequently, the courts have no
17 information about the race, ethnicity or socioeconomic status of the people who
18 are receiving and responding to their jury summons.

20 11. Many states have taken steps to address the underrepresentation of
21 minorities by supplementing the voter registration and Department of Motor
22 Vehicles’ list with other lists, as the California Judicial Council Advisory
23 Committee on Racial and Ethnic Bias in the Courts recommended. For example,
24
25

28 ⁸ Kairys, D., J. B. Kadane, and J. P. Lehoczky (1977). “Jury Representativeness: A
Mandate for Multiple Source Lists,” 65 *California Law Review* 776.

1 New York combines lists of voters, drivers, income tax payers, and welfare and
2 unemployment compensation recipients.⁹

3 12. In 2010, former New York Governor David Patterson signed the Jury
4 Pool Fair Representation Act. The act allows the collection and assembly of race
5 and other demographic data into an annual report designed to address the
6 underrepresentation of minorities on New York juries.
7

8 13. One form of anecdotal evidence is when there is an absence of a
9 particular minority group when their population percentage in the county would
10 be expected to be represented in the jury venire. According to the declarations of
11 public defenders and attorneys, a recurring phenomenon in San Francisco are
12 jury panels of 60-80 potential jurors with few or no African American members.
13 According to the 2010 Census, San Francisco's African American population is
14 5.7%, and thus it would be expected that there would be between 3-4 African
15 Americans on each juror panel if they were properly represented. However,
16 according to the declarations I have reviewed, this is more often not the case.
17
18
19

20 14. Nineteen years after the release of the report, San Francisco's Jury
21 Commissioner has not chosen to supplement the voter and Department of Motor
22 Vehicle lists. It has not used utility subscriber, property tax or other lists and
23 other sources to augment the jury pool. In my opinion, the failure to do so may
24
25
26

27 _____
28 ⁹ Ronald Randall, James W. Woods and Robert G. Martin, "Racial Representation of
Juries: An Analysis of Source List and Administrative Effects on the Jury Pool," Justice
System Journal 29, no. 71:756 (2008).

1 be contributing to the underrepresentation of African Americans on San
2 Francisco jury pools.

3 **IV. SCIENTIFIC RESEARCH ON THE RELATIONSHIP BETWEEN**
4 **RACIAL COMPOSITION AND DIVERSITY OF JURORS AND THE**
5 **DECISION-MAKING OF ACTUAL JURIES**
6

7 15. Behavioral scientists have examined the relationship between a
8 jury's racial composition and its likelihood of conviction. In 2008, Williams and
9 Burk conducted such a study of 178 actual juries in non-capital felony cases
10 involving Black defendants in four sites: Bronx, NY; Los Angeles, CA; Maricopa
11 County, Arizona; and Washington, DC.¹⁰ For each jury in the sample, the
12 researchers computed the percentage of White jurors and noted the final
13 outcome of the deliberations. Researchers also examined a variety of other
14 variables from these trials, such as victim's race, type of attorney (private vs.
15 appointed), whether or not the offense in question was violent, and the strength
16 of the prosecution's case (as assessed by the jurors themselves in a post-trial
17 questionnaire).

18 16. Results indicated that the greater the percentage of Whites on the
19 jury, the more likely the jury was to convict an African American defendant. This
20 relationship between jury racial composition and verdict tendency was
21 statistically significant, in this instance at a probability level exceeding 99%. In
22

23
24
25
26
27
28 ¹⁰ Williams, M. R., & Burek, M. W. (2008). Justice, juries, and convictions: The
relevance of race in jury verdicts. *Journal of Crime and Justice*, 31, 149-169.

1 other words, the data from this study indicate a reasonably and statistically
2 significant probability that increasing minority representation on the studied
3 juries would have decreased the likelihood that the juries convicted.

4
5 17. Importantly, this relationship between jury racial composition and
6 verdict tendency reported by Williams and Burek was not limited to only one type
7 of crime. Whether or not the crime in question was violent did not emerge in the
8 statistical model as a significant predictor of jury verdict tendency. In addition,
9 this relationship between jury racial composition and verdict tendency was not
10 limited to only those cases in which the prosecution's case was relatively weak.
11 Jurors' ratings of the strength of the prosecution's case did not emerge in the
12 statistical model as a significant predictor of jury verdicts. The relationship
13 Williams and Burek identified between jury racial composition and verdict
14 tendency remained statistically significant regardless of crime type or strength of
15 prosecution case, and was not dependent on the presence of a particular set of
16 facts or explicitly racial considerations at trial.

17
18 18. Research also has demonstrated that increasing the proportion of
19 African American jurors on a jury changes the way that White jurors view a case.
20 Research outside of the legal domain has demonstrated that a group's diversity
21 affects the way its individual members process information and interact with one
22
23
24
25
26
27
28

another.¹¹ To test this conclusion in a legal setting, in 2006 Sommers conducted a mock jury study that examined the effects of a diverse jury composition on the performance and decision-making of White mock jurors.¹²

19. In this study, conducted in Washtenaw County, Michigan, Sommers had 29 mock juries watch the video summary of a sexual assault trial involving an African American defendant. Half of the mock juries watching the trial were all-White; the other half were 1/3 African-American and 2/3 White. Results indicated that, consistent with the scientific literature on actual juries reviewed above, African American mock jurors were less likely to vote to convict the defendant than were White mock jurors. Moreover, differences were also observed within the groups of White respondents, as White mock jurors on racially-diverse juries were significantly less likely to vote to convict the defendant than were those White mock jurors on all-White juries.

20. Furthermore, analysis of the videorecorded deliberations in this study indicated that compared to all-White mock juries, racially-diverse mock juries were more thorough in their deliberations on the case, made fewer inaccurate statements regarding the facts of the case, and were more willing to

¹¹ For review see, *e.g.*, Sommers, S. R. (2008). Determinants and consequences of jury racial diversity: Empirical findings, implications, and directions for future research. *Social Issues and Policy Review*, 2, 65-102.

¹² Sommers, S. R. (2006). On racial diversity and group decision-making: Identifying multiple effects of racial composition on jury deliberations. *Journal of Personality and Social Psychology*, 90, 597-612.

1 discuss potentially controversial issues such as racial profiling. In short, the
2 results of this mock jury study are consistent with the research findings described
3 above regarding analyses of actual juries. Not only does this study suggest that as
4 the proportion of African American jurors increases the likelihood of conviction
5 decreases, but it also demonstrates the potential for a jury's racial composition to
6 influence its deliberation process and content.
7

8 21. Another explanation for the link between jury racial composition and
9 trial outcomes involves motivational, or non-informational processes. More
10 precisely, individuals experience very different motivations and concerns when in
11 diverse versus homogeneous groups. Hans and Vidmar (1986) discussed this
12 possibility decades ago, writing that the presence of minority jurors "may inhibit
13 majority group members from expressing prejudice, especially if the defendant is
14 from the same group as the minority group jurors" (p. 42). Anecdotal evidence
15 also suggests that juror prejudice, when voiced during deliberation, elicits a
16 different response on diverse versus homogeneous juries. For example, the
17 biased statements allegedly made during deliberations in the Massachusetts
18 murder trial described above may never have come to the attention of the defense
19 attorney—or led to a post-trial hearing—were it not for the immediate and
20 forceful response of the sole African-American on that jury. Empirically
21 speaking, the Sommers (2006) mock jury study referenced above found that
22 White mock jurors were more vocal and factually accurate in discussing the facts
23 of the case when deliberating in diverse versus all-White juries, indicating that
24
25
26
27
28

1 White jurors interact and even think differently in diverse settings. In sum, as
2 important as are the Constitutional ideals underlying the pursuit of diverse,
3 representative juries, empirical research indicates that jury racial composition
4 also has more observable, quantifiable effects. Data indicate that a jury's racial
5 composition has the potential to influence the nature and quality of its
6 deliberation processes. There does seem to be evidence to support the intuition
7 of attorneys that their minority client will face better odds the more diverse the
8 empanelled jury is. And this conclusion is not simply the result of tipping the
9 balance of the pre-deliberation vote split—the performance of White jurors
10 themselves can vary dramatically depending on the racial composition of those in
11 the jury room with them.

15 22. In 2010, Duke University researchers Shamena Anwar, Patrick Bayer and Randi
16 Hjalmarsson examined the impact of jury racial composition on trial outcomes using a
17 data set of 700 felony trials in Florida between 2000 and 2010. Using a research design
18 that exploited day-to-day variation in the composition of the *jury pool* to isolate quasi-
19 random variation in the composition of the seated jury, they found evidence that (i)
20 juries formed from all-white jury pools convict black defendants significantly (16
21 percentage points) more often than white defendants, and (ii) this gap in conviction
22 rates is entirely eliminated when the jury pool includes at least one black member. The
23 study found that "that the application of justice is highly uneven, as even small changes
24 in the composition of the jury pool have a large impact on average conviction rates for
25 black versus white defendants." They also show that defendants of each race do
26 relatively better when the jury pool contains more members of their own race, raising

1 obvious concerns about whether black defendants receive a fair trial in jurisdictions
2 with a small proportion of blacks in the jury pool."¹³ The study was also very significant
3 because it found that adding black potential jurors to the pool can also affect trial
4 outcomes even when these jurors are not ultimately seated on the jury.¹⁴

5 **V. CONCLUSION**

6
7 23. The scientific literature on jury decision-making indicates that
8 failure to use diverse juries in criminal cases and the systematic
9 underrepresentation of African-Americans in the jury pool undermines the
10 fairness of a trial.
11

12 24. More precisely, scientific empirical analysis of actual jury outcomes
13 has indicated that a jury's composition has the potential to affect trial outcomes.
14 While it is beyond the ability of a behavioral scientist to offer the conclusion that
15 any particular jury definitely would have rendered a different verdict had its
16 composition been different, the scientific literature does support the conclusion
17 that there is a reasonable probability that diverse juries are less likely to convict
18 African American defendants.
19
20

21 Sworn to under the penalty of perjury, this 24 day of August, 2016:

22
23 
24
25

26
27 ¹³ Anwar. Patrick Bayer and Randi Hjalmarsson (2012) , *The Impact of Jury Race in*
28 *Criminal Trials*, Quarterly Journal of Economics, Oxford University Press 1–3 9.
doi:10.1093/qje/qjs014.

¹⁴ *Id.* at page 4.

Samuel R. Sommers

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Proof of Service

I, the undersigned, say:

I am over eighteen years of age and not a party to the above action. My business address is 555 Seventh Street, San Francisco, California 94103.

On _____, I personally served copies of the attached on the following:

San Francisco District Attorney, 2nd Floor
850 Bryant Street
Francisco, CA 94103

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____ in San Francisco, California.

1 Jeff Adachi
Public Defender
2 City and County of San Francisco
Matt Gonzalez
3 Chief Attorney
Attorney First Last, SBN #####
4 Deputy Public Defender
555 Seventh Street
5 San Francisco, CA 94103
Direct: (415) _____
6 Main: (415) 553-1671

7 Attorneys for Client Name

8 **Superior Court of the State of California**
County of San Francisco

10 **People of the State of California,**

11 Plaintiff,

12 vs.

13 **Client Name,**

14 Defendant.

SCN: _____
MCN: _____

**Motion for Formal Bail Hearing
and Order Releasing Defendant
on Own Recognizance or
Bail Reduction**

Date: «Date»
Time: 9:00 AM
Dept: «Dept»

17 To the District Attorney of San Francisco and to the above Court:

18 Defendant [name] moves the court for a bail hearing and an order releasing Defendant
19 on his own-recognizance or for a bail reduction because bail, as presently set, is
20 unreasonable and beyond the defendant's means given the charges and facts, and violates
21 the Eighth Amendment's proscription against excessive bail.

22 This motion is based on the attached points and authorities, the declaration of counsel,
23 and any testimony or evidence adduced at the hearing on this motion.

24 **Statement of Facts**

25 Defendant is charged under section(s) _____ of the _____
26 Code. The offense allegedly occurred as follows:

27 _____ [INCLUDE INFORMATION HERE ABOUT FACTS OF THE CASE.]

28 _____.

1 Defendant lives at [REDACTED] with [REDACTED]. [List the specific
2 factors supporting OR/bail, such as current employment, length of time in the Bay Area,
3 community contacts, acceptance to treatment programs, lack of bench warrant history,
4 effect of his/her incarceration on dependents, etc. These factors will be repeated in your
5 declaration with information as to how you are aware of them. Attach supporting
6 documentation as exhibits.] See attached Declaration of Counsel.

7 8 **Points and Authorities**

9 Defendant makes this motion on the grounds that bail, as sets, violates the federal and
10 state constitutional prohibitions on excessive bail,¹ and their respective due process
11 clauses.²

12 **1. The defendant is entitled to an evidentiary hearing to present witnesses and evidence supporting release pending trial.**

13 Defendant makes this motion under Penal Code³ section 1270.2, which provides for
14 automatic review of bail within five calendar days of the original bail order. At a bail
15 hearing, defendant is entitled to present evidence on any factors which might affect the
16 court's decision whether to release the defendant pending trial on bail (§ 1275) or on his
17 own recognizance (§ 1318).

18 Bail is a critical constitutional and procedural right warranting careful review, as the
19 Supreme Court has long recognized: “[f]ixing bail is a serious exercise of judicial
20 discretion that is often done in haste – the defendant may be taken by surprise, his
21 counsel has just been engaged, or for other reasons, the bail is fixed without that full
22 inquiry and consideration which the matter deserves.”⁴

23
24
25 ¹ Cal. Const. art. I, sec. 12 (c); U.S.C.A. Const., Amend. 8 (excessive bail).

26 ² Cal. Const. art. I, sec. 7 (a). sec. 15; U.S.C.A. Const., Amend. 5.

27 ³ Further statutory references are to the Penal Code, unless otherwise stated.

28 ⁴ *Stack v. Boyle* (1951) 342 U.S. 1, 11 (J. Jackson, concurring opn.).

1 Indeed, in San Francisco, the initial bail decision comes at arraignment, only minutes
2 after counsel has been appointed to represent the accused. The client typically has just a
3 few minutes to speak with counsel before the court makes its initial bail determination.

4 Given the protection against excessive bail and the right to due process, it is
5 imperative that the court hold a hearing within the statutory five days (§ 1270.2), to be
6 well-informed of all facts and information necessary to a fair determination of bail.

7
8 **2. The court may not presume guilt in deciding whether to release the
defendant or in setting bail.**

9 No authority supports the proposition that the court should presume guilt when
10 deciding bail,⁵ and a law that fails to afford an individualized determination in setting bail
11 violates the substantive due process clause of the Fourteenth Amendment.⁶

12 Bail is “excessive” in violation of the Eighth Amendment when set at a figure higher
13 than an amount reasonably calculated to ensure the asserted governmental interest. If the
14 only asserted interest is to guarantee that the accused will stand trial and submit to
15 sentence if found guilty, then “bail must be set by a court at a sum designed to ensure that
16 goal, and no more.”⁷ “This traditional right to freedom before conviction permits the
17 unhampered preparation of a defense, and serves to prevent the infliction of punishment
18 prior to conviction. ‘ . . . Unless this right to bail before trial is preserved, the presumption
19 of innocence, secured only after centuries of struggle, would lose its meaning.’”⁸

20 ⁵ At least before indictment or preliminary hearing, as here, to be distinguished from the
21 post-indictment situation addressed in *Ex parte Duncan* (1879) 53 Cal. 410.

22 ⁶ See *Lopez-Valenzuela v. Arpaio* (9th Cir. 10/15/2014) --- F.3d ---, 14 Cal. Daily Op.
23 Serv. 11, 847 (Arizona’s Proposition 100, with its presumption against bail based on
immigration status, violates substantive due process).

24 ⁷ *United States v. Salerno* (1987) 481 U.S. 739, 754.

25 ⁸ *Stack v. Boyle, supra*, 342 U.S. at 4. Note that in *Bell v. Wolfish* (1979) 441 U.S. 520,
26 533, the Court enunciated a narrower view of the presumption of innocence, describing it
27 as “a doctrine that allocates the burden of proof in criminal trials,” and denying that it has
28 any “application to a determination of the rights of a pretrial detainee during confinement
before his trial has even begun.” But the Court has *never* said that guilt may be presumed
when setting bail.

1 That guilt is not presumed is the only natural implication of the state constitutional
2 and statutory language permitting denial of bail where “the facts are evident or the
3 presumption great.”⁹ If guilt were presumed in every bail setting, there would be no need
4 to include language regarding the presumption of guilt only as to certain crimes. At the
5 bail hearing, the accused has the right and must be given the opportunity to rebut any
6 accusations asserted by the prosecution. Thus, the court should determine defendant’s
7 bail based upon an individualized determination of whether release is appropriate.¹⁰

8
9 **3. ABA Standards support pre-trial release of defendants, and courts
10 should use the least-restrictive means to ensure defendant’s appearance
11 at trial.**

12 In February 2002, the ABA House of Delegates approved “black letter” standards
13 concerning bail,¹¹ including a presumption for release: “The law favors the release of
14 defendants pending adjudication of charges. Deprivation of liberty pending trial is harsh
15 and oppressive, subjects defendants to economic and psychological hardship, interferes
16 with their ability to defend themselves, and, in many instances, deprives their families of
17 support.”¹²

18 **4. The court should place defendant on own-recognizance release.**

19 Article I, section 12, of the California Constitution establishes a person’s right to
20 obtain release on bail from pretrial custody, prohibits the imposition of excessive bail as
21 to all crimes where bail is available, sets forth the factors a court shall take into

22 ⁹ Cal. Const. art. I, sec. 12 (c); Pen. Code, §1271.

23 ¹⁰ *In re Christie* (2001) 92 Cal.App.4th 1105; accord *Lopez-Valenzuela v. Arpaio* (9th
24 Cir. 10/15/2014) --- F.3d ---, 14 Cal. Daily Op. Serv. 11, 847.

25 ¹¹ *ABA Standards for Criminal Justice: Pretrial Release*, 3d ed. Standard 10-1.1, titled
26 “Purposes of the pretrial release decision.”

27 ¹² See also *ABA Standards for Criminal Justice: Pretrial Release* 29 (3d. ed. 2007) (citing
28 “considerable evidence that pretrial custody status is associated with the ultimate
outcomes of cases, with released defendants consistently faring better than defendants in
detention”).

1 consideration in fixing the amount of the required bail, and recognizes that a person “may
2 be released on his or her own recognizance in the court's discretion.” Similarly, section
3 1270 (a) provides that a court may grant own-recognizance release of any person arrested
4 for or charged with a non-capital offense, if the person is entitled to bail, and section
5 1318 sets forth the requirements of an own-recognizance release agreement.¹³ So, a
6 defendant charged with a bailable offense who seeks pretrial release from custody
7 typically has two options: seek own-recognizance release or post bail.

8 Defendant may obtain own-recognizance release only upon certain assurances.
9 Specifically, under 1318, a defendant must: (1) promise to appear at all further
10 proceedings, (2) promise not to depart from the state without leave of the court, (3) agree
11 to waive extradition in the event the accused fails to appear as required and is
12 apprehended outside the State of California, and (4) promise “to obey all reasonable
13 conditions imposed by the court or magistrate.”¹⁴ Even a person charged with a violent or
14 serious felony¹⁵ is generally eligible for release on his own recognizance, after a hearing.

15 When determining whether to grant own-recognizance release, the court *shall*
16 consider all of the following factors:¹⁶

- 17 • evidence of past court appearances of the detained person;
- 18 • the maximum potential sentence that could be imposed;
- 19 • the danger that may be posed to others if the detained person is released;¹⁷ and
- 20 • evidence offered by the detained person regarding his or her ties to the
21 community and the ability to post bond.

22
23
24 ¹³ See Pen. Code, § 1318; *In re York* (1995) 9 Cal.4th 1133, 1140-1141.

25 ¹⁴ Pen. Code, § 1318.

26 ¹⁵ As defined in Pen. Code, §§ 667.5 (c) and 1192.7 (c).

27 ¹⁶ Pen. Code, § 1270.1 (c).

28 ¹⁷ Defendant objects that all statutory provisions mandating primary consideration of
public safety or future dangerousness are unconstitutional. See section 8, *infra*.

1 The court's discretion to release a defendant on their own recognizance "is not . . . an
2 arbitrary discretion to do abstract justice according to the popular meaning of that phrase,
3 but is a discretion governed by legal rules to do justice according to law."¹⁸ At own-
4 recognizance release hearings, the prosecution has the burden of producing evidence on
5 the detainee's record of appearance at prior court hearings and the severity of the
6 sentence potentially faced.¹⁹

7 Here, the facts favor own-recognizance release because [Argue each of the factors in
8 your case — support with declarations and letters].

9
10 **5. The legislative preference for alternatives to incarceration should be followed here.**

11 In general, courts should consider alternatives to incarceration, because the
12 Legislature has recognized that jails and prisons by and large fail to enhance public safety
13 and can promote, rather than reduce, recidivism. Moreover, there are a dramatically
14 disproportionate number of minorities and mentally-ill people in custody, a crisis that
15 courts can ameliorate through alternatives to pre-trial incarceration.

16
17 **A. Public safety is better addressed through alternatives to incarceration.**

18 Recently, the Legislature emphasized that incarceration is largely ineffective in
19 protecting the public and preventing recidivism.²⁰ In response, 2011 legislation made
20 extensive changes in felony sentencing through Realignment,²¹ which was expressly
21 intended to address public safety and fiscal concerns by reducing recidivism among lower
22 level criminal offenders through the use of community-based measures, rather than

23
24 ¹⁸ *In re Podesto* (1976) 15 Cal.3d 921, 933 [quotation marks and citations omitted].

25 ¹⁹ *Van Atta v. Scott* (1980) 27 Cal.3d 424, 438-439, superseded on other grounds via
26 constitutional amendment (Prop. 4) as recognized in *York, supra*, 9 Cal. 4th at 1134 n.7.

27 ²⁰ See, e.g., Pen. Code, § 3450 ("Despite the dramatic increase in corrections spending
28 over the past two decades, national re-incarceration rates for people released from prison
remain unchanged or have worsened").

²¹ Stats. 2011, chaps. 15, 39, 136, 1st Ex. Sess., chap. 12.

1 increased incarceration.²² Further, recognizing the prevalence of mental health issues
2 among the incarcerated populations,²³ the Legislature expressly linked incarceration of
3 the mentally ill with recidivism and an increased threat to public safety.²⁴

4 **B. Electronic monitoring should be used to ensure that the defendant appears for
5 future court dates and that public safety is observed.**

6 **Only include this section if you are requesting electronic
7 monitoring. Please review PD wiki page on electronic monitoring
8 and discuss with client before making this request.**

9 The court may, as an alternative to pre-trial custody, order electronic monitoring as a
10 condition of bail or own-recognizance release.²⁵ The Legislature has expressed its
11 preference for non-incarceration alternatives, specifically focusing on the use of
12 electronic monitoring as an effective means through which conditions of release can be
13 monitored: “an alternative custody program may include the use of electronic monitoring,
14 global positioning system devices, or other supervising devices for the purpose of helping
15 to verify a participant’s compliance with the rules and regulations of the program.”²⁶

16 Upon court order, the sheriff’s office will place an eligible client on pre-trial GPS/EM
17 through LCA,²⁷ a highly-successful²⁸ company that contracts with San Francisco to
18 administer electronic monitoring/GPS of pre-trial defendants, probationers, and others.

19 **Here, defendant has been pre-approved for electronic monitoring.**²⁹

20 ²² See Pen. Code, § 17.5(a) (extensive statement of legislative findings).

21 ²³ The percentage of inmates with mental health needs has risen sharply over the past five
22 years, from 56 percent in 2008 to 71 percent today. See San Francisco Controller’s
23 Report, County Jail Needs Assessment, August 15, 2013, at p. 13.

24 ²⁴ See CA LEGIS 26 (2014), 2014 Cal. Legis. Serv. Ch. 26 (A.B. 1468) (“When the
25 mental health needs of young offenders are ignored, these youth enter a high-risk zone of
26 becoming chronic adult offenders, committing further crimes, and filling up our already
27 crowded prisons and jails. This comes at a cost in public safety...).

28 ²⁵ Pen. Code, §§1269c, 1318(a)(2); *In re York* (1995) 9 Cal.4th 1133.

²⁶ See Pen. Code, § 1170.06.

²⁷ See: www.lcaservices.com

²⁸ *Id.* (little recidivism, high return-to-court rate for San Francisco pretrial population).

²⁹ See attached pre-approval letter.

1 **6. Pretrial incarceration will negatively impact the adjudicated outcome in**
2 **defendant's case. (OPTIONAL)**

3 According to a 2013 Department of Justice report, over sixty percent of the people
4 housed in jails across the country are pretrial detainees.³⁰ In San Francisco, pretrial
5 detainees comprise over eighty-five percent of jail inmates. According to the Sheriff's
6 department, while some pretrial detainees are confined because they pose a danger or
7 present a flight risk, twenty-five to thirty percent are charged with relatively minor
8 property crimes, drug offenses or non-violent acts — they remain in jail simply because
9 the bail was set in an amount they cannot afford to pay. As a result, money bail becomes
10 a form of pretrial detention for the poor and nonviolent, and these "bail eligible"
11 detainees languish in jail for weeks and months until their criminal charges are resolved.

12 Pretrial detention also has an adverse impact on the adjudicated trajectory of a
13 criminal case. In effect, the decision to detain a defendant pretrial, or a decision to impose
14 a money bail is tantamount to a decision to convict. According to the Department of
15 Justice, seventy-eight percent of defendants held on bail are eventually convicted, but just
16 sixty percent of released defendants are ultimately convicted.³¹ Defendants held in jail
17 pending trial are more likely to plead guilty and tend to receive worse plea offers from
18 prosecutors than released defendants.³² As a result, pretrial detainees are more likely to
19 plead to a more serious felony offense and/or accept more onerous probation conditions.
20 Moreover, defendants subjected to pretrial detention face a greater prospect of post-
21 adjudication incarceration and receive longer prison sentences than released defendants
22

23 ³⁰ U.S. Department of Justice Bureau of Statistics, Jail Inmates at Midyear 2012 –
24 Statistical Tables at 1 (2013), Todd D. Minton

25 ³¹ State Court Processing Statistics 1990-2004: Pretrial Release of Felony Defendants in
26 State Court (2008), Cohen & Reaves, note 85 at page 7.

27 ³² Bias in Formalized Bail Procedures, Race & Criminal Justice 40, Michael Lynch & E.
28 Britt Patterson; Predicting Violence, 90 Tex L. Rev. 497, 555 n. 275 (2012) (reporting
that the impact of pretrial detention on the sentence imposed shows that detained
defendants are more likely to be found guilty, plead guilty, and serve prison time and will
serve longer sentences in prison.).

1 with similar charges and criminal histories.³³ A 2007 study found that defendants in
2 pretrial detention were four times more likely to receive a jail or prison sentence, and
3 received sentences eighty-six percent longer than defendants who were released pretrial.³⁴

4 Given these findings, the court should subject a defendant to pretrial detention only in
5 cases where it does not receive adequate assurance of the defendant's return to court.

6 **7. Defendant's pretrial incarceration will exacerbate this County's practice**
7 **of disproportionately setting higher bails for African Americans and**
8 **Latinos. (OPTIONAL)**

9 Over the last fifty years, research studies have consistently found that African
10 American defendants receive significantly harsher bail outcomes than those imposed on
11 white defendants.³⁵ Specifically, nearly every study on the impact of race in bail
12 determinations has concluded that African Americans are subjected to pretrial detention
13 at a higher rate and higher bail amounts than are white arrestees with similar charges and
14 criminal histories. The adverse impact of the defendant's race on the outcome of the bail
15 determination is not a new or recent problem, nor is it confined to specific types of cases.
16 Over twenty-five studies document racial disparities in bail determinations in state
17 cases,³⁶ federal cases,³⁷ and juvenile delinquency proceedings.³⁸ The adverse impact of

18 ³³ Bail & Sentencing: Does Pretrial Detention Lead to Harsher Punishment? 20 Criminal
19 Justice Policy Review 1, 1, 11 (October 2012) Meghan Sacks & Alissa Ackerman
20 (documenting a study of 634 cases processed in 200-4, concluding that "defendants who
21 were held in pretrial detention received longer sentences than those who were able to post
22 bail").

23 ³⁴ The Cumulative Effects of Racial Disparities in Criminal Proceeding, 7 J. Inst. Justice.
24 & International Studies note 91 at 261, 270-71 (2007) Traci Schlesinger (explaining the
25 findings of a study of a representative sample of 36,000 men charged with felony drug
26 offenses during 1990-2002). See also A Tale of Two Counties: The Impact of Pretrial
27 Release, Race and Ethnicity Upon Sentencing Decisions, 22 Crim. Just. Studies 203, 212,
28 215 (2009) (finding that of roughly 1,600 felony cases filed in May 1998, pretrial
detention was a "significant predictor" in the judge's decision to sentence the defendant
to a period of incarceration. In fact, pretrial detainees were four times more likely to be
sentenced to incarceration than were defendant who were released before trial.

³⁵ See Give Us Free: Addressing Racial Disparities in Bail Determinations by Cynthia E.
Jones.

³⁶ Racial and Ethnic Disparity in Pretrial Criminal Processing, 22 Just. Q. 170, 187
(2005) Traci Schlesinger; Racial and Ethnic Differences in Pretrial Release and Decisions
and Outcomes: A Comparison of Hispanic, Black and White Felony Arrestees, 41
Criminology 873, 880-81 (2003) Stephen DeMuth.

1 race and ethnicity on bail determinations is not isolated to particular regions of the
2 country, but is a pervasive and widely-acknowledged problem, documented in vast areas
3 of the country,³⁹ and similarly affecting Latino defendants.⁴⁰

4 Indeed, researchers found that white defendants with a prior felony conviction
5 received more favorable bail outcomes than similarly-situated African American
6 defendants.⁴¹ The Department of Justice examined 30,000 crimes filed in forty-five
7 counties across the country found that African Americans were sixty-six percent more
8 likely to be in jail pretrial than were white defendants, and that Latino defendants were
9 ninety-one percent more likely to be detained pretrial.⁴²

10 Overall, the odds of similarly-situated African American and Latino defendants being
11 held on bail because they were unable to pay the bond amounts imposed were *twice* that
12 of white defendants.⁴³

13 Another study found that “being Black increases a defendant’s odds of being held in
14 jail pretrial by 25%.”⁴⁴ Even when the court imposed a money bond, African Americans

15 ³⁷ Race, Sex, and Pretrial Detention in Federal Court: Indirect Effects and Cumulative
16 Disadvantage, 57 U. Kan. L. Rev. 879 (2009) Cassia Spohn; Criminal Justice Decision
17 Making as a Stratification Process: The Role of Race and Stratification Resources in
Pretrial Release, 5 J. Quantitative Criminology 57 (1989), Celesta A. Albonetti et al.

18 ³⁸ Reducing Racial Disparities in Juvenile Detention (2001) Eleanor Hinton Hoytt.

19 ³⁹ Race and Presentencing Decisions: The Cost of Being African American, Racial Issues
20 in Criminal Justice: The Case of African Americans 137, 140-41, (2003) Marvin D. Free
21 (meta analysis of bail studies in 2003 between 1979 and 2000, including 18 studies all
showing African Americans receiving higher bail than white, including studies
controlling for all varying factors.

22 ⁴⁰ Pretrial Release of Latino Defendants Final Report (2008) Pretrial Justice Institute;
David Levin.

23 ⁴¹ Race and Presentencing Decisions: The Cost of Being African American, Racial
24 Issues in Criminal Justice: The Case of African Americans 137, 140-41, (2003) Marvin
D. Free.

25 ⁴² Data Collection: State Court Processing Statistics (SCPS) Bureau of Justice Statistics;
26 see Demuth Study, *supra*, at p. 895.

27 ⁴³ Demuth Study, *supra*, at p. 897.

28 ⁴⁴ See Schlesinger, *supra*, at p. 181 (2005 over 36,000 felony bail determination reviewed
in state court).

1 “have odds of making bail that are approximately half *those of Whites* with the same bail
2 amounts and legal characteristics. Indigent Latinos faced similar disadvantages compared
3 to white defendants.”⁴⁵

4 San Francisco is no exception; a 2013 study by the San Francisco Controller’s Office
5 found that while only 6 percent of San Francisco residents are African American, 56
6 percent of jail inmates are black; by contrast, while approximately 42 percent of city
7 residents are white, yet whites represent only 22 percent of jail inmates.⁴⁶ In particular,
8 African-American women are disproportionately represented at every phase of the
9 criminal justice system.⁴⁷ A recent probation department analysis confirms the
10 disproportionate number of minorities who are confined pretrial.⁴⁸

11 This is a longstanding and pervasive inequity in our criminal justice system, as
12 evidenced by similar numbers gathered over a decade ago.⁴⁹ The court should keep these
13 stark facts in mind in setting bail so as not exacerbate any unconscious, implicit or
14 institutional bias that may exist.

15
16
17
18
19 ⁴⁵ Schlesinger, Racial and Ethnic Disparity, *supra*, note 99 at p. 183.

20 ⁴⁶ See San Francisco Controller’s Report, County Jail Needs Assessment, August 15,
21 2013, at p. 11-12.

22 ⁴⁷ Women’s Community Justice Reform Blueprint A Gender-Responsive, Family-
23 Focused Approach to Integrating Criminal and Community Justice, April 2013, Adult
24 Probation Department and Sheriff’s Department, City and County of San Francisco.

25 ⁴⁸ See: Realignment in San Francisco: Two Years in Review, January 2014, at
26 [http://sfgov.org/adultprobation/sites/sfgov.org.adultprobation/files/migrated/FileCenter/D
27 ocuments/Adult_Probation/CityofSF_Realignment_Report_web.pdf](http://sfgov.org/adultprobation/sites/sfgov.org.adultprobation/files/migrated/FileCenter/Documents/Adult_Probation/CityofSF_Realignment_Report_web.pdf).

28 ⁴⁹ See: Report on Race & Incarceration In San Francisco: Two Years Later, by Chet
Hewitt, Andrea D. Shorter, and Michael Godfrey, Center on Juvenile and Criminal
Justice, October 1994 (African-American were 11 % of SF’s general adult population,
but made up 48% of the county’s inmates; Latinos comprised 15% of the general adult
population, but accounted for 29% of the jail population); see also Race & Incarceration
in San Francisco: Localizing Apartheid, October 1992, Center on Juvenile and Criminal
Justice, by Chet Hewitt, Ken Kubota, and Vincent Schiraldi (earlier, similar data).

8. Bail as currently set is excessive.

When a defendant is entitled to bail, it must not be excessive.⁵⁰ In fixing the amount, the court must consider the:

- ♦ seriousness of the offense charged
- ♦ defendant's previous criminal record
- ♦ probability that he or she will appear at future court proceedings.⁵¹

While section 1275 (a) adds that "public safety" is to be the primary consideration in setting bail, those portions of section 1275 and other statutory provisions mandating *primary* consideration of public safety or future dangerousness⁵² violate the Eighth Amendment to the United States Constitution, because bail settings in excess of the amount necessary to guarantee future appearances violate the Constitution.⁵³ But while Penal Code section 1275 lists factors to consider in setting bail, it is hardly exhaustive.⁵⁴ Rather, the appropriate bail amount must be determined on a case-by-case basis.⁵⁵

Under section 1275, the court's determination of "the seriousness of the offense charged" includes consideration of the alleged injury or threats to the complaining witness, threats to a witness, alleged use of a deadly weapon in committing the crime, and any allegations of use or possession of controlled substances.⁵⁶ And in fixing bail in a narcotics case, the court must consider the alleged amount of controlled substances involved, and whether the accused was released on bail for a narcotics offense charged

⁵⁰ Cal. Const. art. I, sec. 12 (c); *People v. Standish* (2006) 38 Cal. 4th 858, 875; U.S.C.A. Const., Amend. 8 (excessive bail).

⁵¹ *Id.*

⁵² Pen. Code, §§ 1270, 1270.1 and 1275.

⁵³ *Stack v. Boyle*, *supra*, 342 U.S. at 5; see also *Salerno*, *supra*, 481 U.S. at 753 (affirming this principle, even while authorizing detentions *without* bail); see *Schilb v. Kuebel* (1971) 404 U.S.357, 365 (excessive bail clause of Eighth Amendment applies to the states); *In re Nordin* (1983) 143 Cal.App.3d 538, 543-44 (same).

⁵⁴ *In re Alberto* (2002) 102 Cal.App.4th 421, 430.

⁵⁵ *Stack v. Boyle*, *supra*, 342 U.S. at 5.

⁵⁶ Pen. Code, §1275(a).

1 under Chapter 6 of the Health & Safety Code (§11350 et seq.) when he or she committed
2 the currently alleged offense.⁵⁷

3 The ABA advises against overreliance on the charge in setting bail: “Although the
4 charge itself may be a predicate to pretrial detention proceedings, the judicial officer
5 should exercise care not to give inordinate weight to the nature of the present charge in
6 evaluating factors for the pretrial release decision except when, coupled with other
7 specified factors, the charge itself may cause the initiation of a pretrial detention hearing
8 ...”⁵⁸

9 The bail schedule is not a fixed, immutable determination, but merely provides a
10 baseline amount. Indeed, because the schedule is not set based on the individual case, it is
11 arguably unconstitutional. Even if not, *San Francisco has some of the most expensive bail*
12 *schedules in the state*, even though it also has one of the highest poverty levels at 23.4%.
13 For example, the presumptive bail for assault with a deadly weapon other than a firearm
14 is \$10,000 in Santa Clara County, \$25,000 in Orange County, and \$30,000 in both
15 Alameda and Santa Barbara counties. In San Francisco, the bail for the same offense is
16 \$75,000. The presumptive bail for sales of a controlled substance is \$10,000 in Marin
17 County, \$20,000 in Alameda County, \$25,000 in Santa Clara County — but it is \$35,000
18 in San Francisco.

19 Nonetheless, what is “excessive under the Eight Amendment is not a mathematical
20 test, it is a weighing process among the state interests in protecting the complaining
21 witnesses, ensuring court attendance, and the bail in a given case: “[e]xcessiveness
22 cannot be determined by a general mathematical formula, but rather turns on the
23 correlation between the state interests a judicial officer seeks to protect and the nature and
24 magnitude of bail conditions imposed in a particular case; it is excessive where “the
25

26
27 ⁵⁷ Pen. Code, § 1275 (b).

28 ⁵⁸ ABA Standard 10-1.7, *Consideration of the nature of the charge in determining release options*.

1 amount of bail was excessive in light of the valid purposes for which it was set.”⁵⁹ The
2 state may not set bail to achieve invalid interests⁶⁰ or in an amount excessive in relation
3 to the valid interests it seeks to achieve.⁶¹ So, if the only state interest is to ensure
4 attendance, then setting bail merely to ensure defendant remains in custody is improper.⁶²

5 Here, bail is currently set at \$_____. Based on defendant's history and
6 current situation, the bail currently set is excessive. (ARGUE YOUR SPECIFIC FACTS
7 HERE.)

8 9 Conclusion

10 The Supreme Court has made clear that “[i]n our society liberty is the norm, and
11 detention prior to trial or without trial is the carefully limited exception.”⁶³

12 Here, defendant should be granted own-recognition release because [summarize
13 your strongest factual argument]. Barring that, defendant is entitled to bail unless the
14 prosecution meets specific statutory conditions. Further, the amount of bail must be
15 reasonable and designed to ensure future court appearances.

16 Dated: _____

Respectfully submitted,

18
19 Deputy Public Defender
20 Attorney for Defendant

21 ⁵⁹ *Galen v. County of Los Angeles* (9th Cir. 2007) 477 F.3d 652, 662.

22 ⁶⁰ See *Stack, supra*, 342 U.S. at 5; *Wagenmann v. Adams* (1st Cir.1987) 829 F.2d 196,
23 213 (affirming bail was excessive where the facts established the state had no legitimate
24 interest in setting bail at a level designed to prevent an arrestee from posting bail).

25 ⁶¹ See *Salerno, supra* 481 U.S. at 754.

26 ⁶² *Wagenmann v. Adams, supra*, 829 F.2d at 213 (jury found by a preponderance of the
27 evidence that a police officer caused Wagenmann’s bail to be unconstitutionally
28 excessive by arranging for bail to be set at \$500, when he knew Wagenmann had only
\$480 on hand.) On the other hand, the fact defendant paid bail does not prove it is
appropriate. See *Salerno, supra*, 481 U.S. at 754; accord, *Galen, supra*, 477 F.3d at 662.

⁶³ *Salerno, supra*, 481 U.S. at 755.

Declaration of Counsel

I, the undersigned, declare under penalty of perjury as follows:

I am a deputy public defender for the City and County of San Francisco and in that capacity I have been assigned to the defense of the defendant in the above-entitled action.

Defendant is charged with violating [List charges and code sections].

I have been informed that the defendant has the following community ties: [list community and family ties, etc].

Bail has been set in the amount of \$ _____ which defendant is unable to post.

I believe that bail, as presently set, is unreasonably great and disproportionate to the offense involved and violates the constitutional proscription against excessive bail.

I believe that the prospects of pecuniary loss and criminal penalty for failure to appear in accordance with the terms of a release on own recognizance or bail are well understood by the defendant and are a deterrent to flight.

In view of the above, I respectfully request that the defendant be released on own recognizance, or in the alternative, that bail be reduced and set in a reasonable amount.

The foregoing is true and correct of my own knowledge, except as to those matters stated on information and belief, and as to those, I believe them to be true.

Executed on _____, at San Francisco, California.

[Attorney's name]
Deputy Public Defender
Attorney for Defendant

Proof of Service

I say:

I am over eighteen years of age and not a party to the above action. My business address is 555 Seventh Street, San Francisco, California 94103.

I personally served copies of the attached on the following:

San Francisco District Attorney, 3rd Floor
850 Bryant Street
San Francisco, CA 94103

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____ in San Francisco, California.

STEVEN G. KALAR
Federal Public Defender
GALIA AMRAM
Assistant Federal Public Defender
STEVEN J. KOENINGER
Research and Writing Attorney
DANIEL BLANK
Assistant Federal Public Defender
CANDIS MITCHELL
Assistant Federal Public Defender
ELLEN LEONIDA
Assistant Federal Public Defender
450 Golden Gate Ave, 19-6884
San Francisco, CA 94102
Telephone: (415) 436-7700

Attorneys for Defendants

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

DAVID MADLOCK,
MATTHEW MUMPHREY,
LATONYA CAREY,
CRYSTAL ANTHONY,
DARLENE ROUSE,
ACACIA MCNEAL,
ANITA DIXON,
AARON MATTHEWS,
NIJAH REED,
TIANA REDDIC,
TIFFANY CROSS,
SHOLANDA ADAMS,

Defendants.

Case No: CR 14-643 EMC

**NOTICE OF MOTION AND MOTION
TO COMPEL DISCOVERY ON
SELECTIVE PROSECUTION AND
ENFORCEMENT; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF MOTION**

NOTICE OF MOTION AND MOTION TO COMPEL DISCOVERY ON SELECTIVE PROSECUTION AND
ENFORCEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION
CASE NO. CR 14-643 EMC

NOTICE OF MOTION

TO BRIAN STRETCH, ACTING UNITED STATES ATTORNEY FOR THE
NORTHERN DISTRICT OF CALIFORNIA, AND TO SARAH HAWKINS AND
LLOYD FARNHAM, ASSISTANT UNITED STATES ATTORNEYS:

NOTICE IS HEREBY GIVEN that on February 9, 2016 at 10:00 a.m., or as soon as this
motion may be heard, the above-captioned defendants will move the Court for an order to
compel discovery on selective prosecution and selective enforcement.

This motion is based upon the Memorandum of Points and Authorities in Support hereof,
the attached exhibits and declarations, the Fifth and Fourteenth Amendments of the United States
Constitution, applicable case law, records and files in the instant action, and such other matters
as may be adduced at the hearing of this cause.

NOTICE OF MOTION AND MOTION TO COMPEL DISCOVERY ON SELECTIVE PROSECUTION AND
ENFORCEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION
CASE NO. CR 14-643 EMC

TABLE OF CONTENTS

NOTICE OF MOTION.....	ii
TABLE OF AUTHORITIES	vii
INTRODUCTION	1
FACTUAL BACKGROUND.....	5
I. Operation Safe Schools.....	5
A. Overview.....	5
B. Geographic Area of the Tenderloin	6
C. Types and Amounts of Drugs	8
D. How the DEA/SFPD Conducted Operation Safe Schools.....	9
E. Officers	10
F. Standards for Prosecution	11
G. Criminal History of Operation Safe School Defendants.....	12
II. Racial Demographics of Drug Traffickers in the Tenderloin	13
A. Needle Exchange Survey	13
B. Interviews of Tenderloin Community Members.....	15
III. Racial Demographics of Tenderloin Drug Traffickers Charged in State Court	18
IV. Law Enforcement Knowledge of Non-Black Drug Traffickers in the Tenderloin	22
V. Law Enforcement Interaction With, and Arrests of, Non-Black Drug Traffickers in the Tenderloin	24
A. John Doe-1	26
B. John Doe-2	26
C. John Doe-3	27
D. John Doe-4	29
E. Jane Doe-5	30
NOTICE OF MOTION AND MOTION TO COMPEL DISCOVERY ON SELECTIVE PROSECUTION AND ENFORCEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION	
CASE NO. CR 14-643 EMC	

1	F.	John Doe-6.....	31
2	G.	Jane Doe-7	32
3	H.	John Doe-8.....	32
4	I.	John Doe-9.....	33
5	J.	John Doe-10.....	34
6	K.	John Doe-11	36
7	L.	John Doe-12.....	37
8	M.	John Doe-13.....	37
9	N.	John Doe-14.....	38
10	O.	John Doe-15.....	39
11	P.	John Doe-16.....	40
12	Q.	John Doe-17.....	41
13	R.	John Doe-18.....	41
14	S.	John Doe-19.....	42
15	T.	John Doe-20.....	42
16	U.	John Doe-21	43
17	V.	John Doe-22.....	43
18	W.	John Doe-23.....	44
19	X.	John Doe-24.....	45
20	Y.	John Doe-25.....	45
21	Z.	John Doe-26.....	46
22	AA.	John Doe-27	47
23	BB.	John Doe-28.....	47
24	CC.	John Doe-29.....	48
25	DD.	John Doe-30.....	49
26	EE.	John Doe-31	49
27	FF.	John Doe-32.....	50

NOTICE OF MOTION AND MOTION TO COMPEL DISCOVERY ON SELECTIVE PROSECUTION AND
ENFORCEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION
CASE NO. CR 14-643 EMC

1	GG. Jane Doe-33	51
2	HH. John Doe-34	52
3	II. John Doe-35	52
4	JJ. John Doe-36	53
5	KK. John Doe-37	54
6	LL. John Doe-38	54
7	MM. John Doe-39	55
8	NN. John Doe-40	55
9	OO. John Doe-41	56
10	PP. John Doe-42	56
11	VI. Incidents of Racial Bias by SFPD Generally	56
12	A. Racial disparity	56
13	B. Racist texts	57
14	VII. Evidence of Racial Bias in Operation Safe Schools Officers and in Tenderloin Policing	60
15	A. Evidence of Racial Bias Produced in Discovery in Operation Safe Schools Cases	60
16	B. Incidents of Racial Bias By SFPD Officers In The Tenderloin	61
17	1. Use Of Racial Slurs By SFPD Officers In The Tenderloin	62
18	2. Incidents of Sexually Inappropriate Behavior By SFPD Officers Against Black Women	63
19	3. Acts Of Violence By SFPD Officers In The Tenderloin Against Blacks	67
20		
21		
22	ARGUMENT	69
23	I. Selective Prosecution	69
24	A. Legal Standard	69
25	1. United States v. Armstrong	69
26	2. Discriminatory Effect Prong Of A Selective Prosecution Claim	71
27		
28	NOTICE OF MOTION AND MOTION TO COMPEL DISCOVERY ON SELECTIVE PROSECUTION AND ENFORCEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION CASE NO. CR 14-643 EMC	

1	a.	Definition of Similarly Situated.....	72
2	i.	First Circuit	73
3	ii.	Fourth Circuit.....	73
4	iii.	Seventh Circuit.....	74
5	iv.	Eleventh Circuit	75
6	b.	The Defendants Have Made A Prima Facie Showing Of Discriminatory Effect	75
7	3.	Discriminatory Intent Prong Of A Selective Prosecution Claim.....	78
8	a.	The Defense Has Shown A Prima Facie Case Of Discriminatory Intent	82
9	i.	Comparative analysis.	82
10	(a)	Recidivism	84
11	(b)	Trafficking Drugs Near “Schools”.....	85
12	(c)	Strength of the Evidence.....	87
13	ii.	Use of a policy susceptible to abuse	87
14	II.	Selective Enforcement	90
15	A.	A Selective Enforcement Claim is Cognizable.....	90
16	B.	Standard for Selective Enforcement	94
17	C.	The Defense Has Established a Prima Facie Case of Selective Enforcement.....	96
18	1.	The Defense Has Made a Prima Facie Showing of Discriminatory Effect With Respect to Selective Enforcement.....	96
19	2.	The Defense Has Made a Prima Facie Case of Discriminatory Intent in Regards to Selective Enforcement.....	97
20		CONCLUSION.....	98
21		DISCOVERY REQUEST.....	99
22			
23			
24			
25			
26			
27			
28		NOTICE OF MOTION AND MOTION TO COMPEL DISCOVERY ON SELECTIVE PROSECUTION AND ENFORCEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION CASE NO. CR 14-643 EMC	

TABLE OF AUTHORITIES

Cases

<i>Arlington Heights v. Metro. Hous. Dev. Corp.</i> , 429 U.S. 252 (1977)	78, 98
<i>Armstrong v. Daily</i> , 786 F.3d 529 (7th Cir. 2015)	96
<i>Batson v. Kentucky</i> , 476 U.S. 79 (1986)	82, 88
<i>Carrasca v. Pomeroy</i> , 313 F.3d 828 (3d Cir. 2002)	79
<i>Castaneda v. Partida</i> , 430 U.S. 482 (1977)	84, 89
<i>Chavez v. Ill. State Police</i> , 251 F.3d 612 (7th Cir. 2001)	71, 74, 75, 79, 98
<i>Connecticut v. Teal</i> , 457 U.S. 440 (1982)	96
<i>Crittenden v. Ayers</i> , 624 F.3d 943 (9th Cir. 2010)	82
<i>Crittenden v. Chappell</i> , 804 F.3d 998 (9th Cir. 2015)	83, 85, 87
<i>Curtis v. Rodriguez v. California Highway Patrol</i> , No. 99cv20895 JF, (N.D. Cal. Aug. 1, 2001) [Docket No. 211]	88
<i>Farm Labor Org. Comm. v. Ohio State Highway Patrol</i> , 308 F.3d 523 (6th Cir. 2002)	78, 95
<i>Franks v. Delaware</i> , 438 U.S. 154 (1978)	96
<i>Gibson v. Superintendent of N.J. Dep't of Law & Pub. Safety-Div. of State Police</i> , 411 F.3d 427 (3d Cir. 2005)	92
<i>Glob.-Tech Appliances, Inc. v. SEB S.A.</i> , 563 U.S. 754 (2011)	90
<i>Gomillion v. Lightfoot</i> , 364 U.S. 339 (1960)	80

1	<i>Hudson v. Michigan</i> ,	
	547 U.S. 586 (2006)	94
2	<i>Hunter v. Underwood</i> ,	
3	471 U.S. 222 (1985)	72, 78, 98
4	<i>Lacey v. Maricopa County</i> ,	
	693 F.3d 896 (9th Cir. 2012) (en banc)	92, 95
5	<i>Marshall v. Columbia Lea Reg'l Hosp.</i> ,	
6	345 F.3d 1157 (10th Cir. 2003)	79, 82, 93, 95
7	<i>Miller-El v. Dretke</i> ,	
8	545 U.S. 231 (2005)	83
9	<i>Newsome v. McCabe</i> ,	
	256 F.3d 747 (7th Cir. 2001)	96
10	<i>Pitchess v. Superior Court</i> ,	
11	11 Cal. 3d 531 (1974)	100
12	<i>Rodriguez v. Cal. Highway Patrol</i> ,	
	89 F. Supp. 2d 1131 (N.D. Cal. 2000)	96
13	<i>Rosenbaum v. City & Cty. of S.F.</i> ,	
14	484 F.3d 1142 (9th Cir. 2007)	92
15	<i>Teamsters v. United States</i> ,	
	431 U.S. 324 (1977)	80
16	<i>United States v. Aguilar</i> ,	
17	883 F.2d 662 (9th Cir. 1989)	72
18	<i>United States v. Al Jibori</i> ,	
19	90 F.3d 22 (2d Cir. 1996)	70, 71
20	<i>United States v. Alameh</i> ,	
	341 F.3d 167 (2d Cir. 2003)	79
21	<i>United States v. Alcaraz-Arellano</i> ,	
22	441 F.3d 1252 (10th Cir. 2006)	79, 93, 95
23	<i>United States v. Alexander</i> ,	
	No. 11-CR-148, 2013 WL 6491476 (N.D. Ill. Dec. 10, 2013)	93
24	<i>United States v. Arenas-Ortiz</i> ,	
25	339 F.3d 1066 (9th Cir. 2003)	72
26	<i>United States v. Armstrong</i> ,	
27	517 U.S. 456 (1996)	<i>passim</i>

1	<i>United States v. Armstrong</i> , No. 95-157, 1996 WL 67650 (U.S.Reply.Brief, filed Feb. 15, 1996).	71
2	<i>United States v. Armstrong</i> , No. 95-157, 1996 WL 88550 (Oral. Arg. Trans, Feb. 26, 1996)	80
3	<i>United States v. Barlow</i> , 310 F.3d 1007 (7th Cir. 2002)	79, 93, 95
4	<i>United States v. Bell</i> , 86 F.3d 820 (8th Cir. 1996)	93, 95
5	<i>United States v. Buford</i> , 632 F.3d 264 (6th Cir. 2011)	94
6	<i>United States v. Davis</i> , 766 F.3d 722 (7th Cir. 2014), <i>rev'd and remanded en banc</i> , 793 F.3d 712 (7th Cir. 2015)	71, 73
7	<i>United States v. Davis</i> , 793 F.3d 712 (7th Cir. 2015) (en banc)	92, 96
8	<i>United States v. Dixon</i> , 486 F. Supp. 2d 40 (D.D.C. 2007)	95
9	<i>United States v. Duque-Nava</i> , 315 F. Supp. 2d 1144 (D. Kan. 2004)	71, 79, 93, 96
10	<i>United States v. Erne</i> , 576 F.2d 212 (9th Cir. 1978)	91
11	<i>United States v. Gomez-Lopez</i> , 62 F.3d 304 (9th Cir. 1995)	91
12	<i>United States v. Gonzalez-Torres</i> , 309 F.3d 594 (9th Cir. 2002)	72
13	<i>United States v. Greene</i> , 698 F.2d 1364 (9th Cir. 1983)	91
14	<i>United States v. Hare</i> , 308 F. Supp. 2d 955 (D. Neb. 2004)	93
15	<i>United States v. Harmon</i> , 785 F. Supp. 2d 1146 (D.N.M. 2011)	94
16	<i>United States v. Hayes</i> , 236 F.3d 891 (7th Cir. 2001)	75

1	<i>United States v. Henthorn</i> ,	
	931 F.2d 29 (9th Cir. 1991)	100
2	<i>United States v. James</i> ,	
3	257 F.3d 1173 (10th Cir. 2001)	93, 95
4	<i>United States v. Lamar</i> ,	
5	No. 14-CR-726, 2015 WL 4720282 (S.D.N.Y. Aug. 7, 2015)	93
6	<i>United States v. Lewis</i> ,	
	517 F.3d 20 (1st Cir. 2008)	70, 73
7	<i>United States v. Monsoor</i> ,	
8	77 F.3d 1031 (7th Cir. 1996)	91
9	<i>United States v. Montero-Camargo</i> ,	
	208 F.3d 1122 (9th Cir. 2000) (en banc)	92
10	<i>United States v. Nichols</i> ,	
11	512 F.3d 789 (6th Cir. 2008)	94
12	<i>United States v. Olvis</i> ,	
	97 F.3d 739 (4th Cir. 1996)	70, 74, 81
13	<i>United States v. Paxton</i> ,	
14	No. 13 CR 103, 2014 WL 1648746 (N.D. Ill. Apr. 17, 2014)	70, 79, 90, 93, 98
15	<i>United States v. Smith</i> ,	
16	231 F.3d 800 (11th Cir. 2000)	75, 76, 80
17	<i>United States v. Tuitt</i> ,	
	68 F. Supp. 2d 4 (D. Mass. 1999)	<i>passim</i>
18	<i>United States v. Turner</i> ,	
19	104 F.3d 1180 (9th Cir. 1997)	72, 74, 91, 92
20	<i>United States v. Venable</i> ,	
	666 F.3d 893 (4th Cir. 2012)	70, 74, 81
21	<i>United States v. Whitfield</i> ,	
22	29 F. Supp. 3d 503 (E.D. Pa. 2014)	93
23	<i>Washington v. Davis</i> ,	
	426 U.S. 229 (1976)	80
24	<i>Wayte v. United States</i> ,	
25	470 U.S. 598 (1985)	79, 88
26	<i>Whren v. United States</i> ,	
27	517 U.S. 806 (1996)	91, 94

1	<i>Yick Wo v. Hopkins</i> ,	
2	118 U.S. 356 (1886)	72, 91

Federal Statutes

4	21 U.S.C. § 860(a)	6
---	--------------------------	---

State Statutes

6	Cal. Health & Safety Code § 11350.....	56
7	Cal. Health & Safety Code § 11351.....	31, 52, 57
8	Cal. Health & Safety Code § 11351.5	<i>passim</i>
9	Cal. Health & Safety Code § 11352.....	<i>passim</i>
10	Cal. Health & Safety Code § 11353.6.....	6, 43, 44
11	Cal. Health & Safety Code § 11359.....	34, 41
12	Cal. Health & Safety Code § 11360.....	19
13	Cal. Health & Safety Code § 11366.....	28, 29, 41
14	Cal. Health & Safety Code § 11375.....	19, 57
15	Cal. Health & Safety Code § 11377.....	30, 41
16	Cal. Health & Safety Code § 11378.....	<i>passim</i>
17	Cal. Health & Safety Code § 11378.5.....	19
18	Cal. Health & Safety Code § 11379.....	<i>passim</i>
19	Cal. Penal Code § 1291	36
20	Cal. Penal Code § 12022.1.....	49

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

On December 5, 2014, San Francisco Police Department (“SFPD”) officers were conducting a “buy bust” operation focused on the intersection of Hyde Street and Golden Gate Avenue. This area of the Tenderloin not only was “well known to officers due to the high level of narcotics activity” that takes place there, but SFPD and the Tenderloin community also knew it was controlled by Latino narcotics traffickers. The intersection of Hyde and Golden Gate is located approximately a block and a half from the DeMarillac Academy, a school for young children. According to one officer participating in the December 5 “buy bust,” “[p]arents who have no other option, but to walk their children to and from this school must endure walking through what seems like a narcotics flea market on a daily basis.”¹

During the December 5 operation, one undercover officer “observed a Hispanic male,” (John Doe-1), who was standing on the corner and had previously been identified by citizen informants “as one of the people who is out on a daily basis selling suspected base rock cocaine during morning hours.”² The officer approached Doe-1 and purchased a rock of crack cocaine from him; Doe-1 was then arrested by other SFPD officers. This was not Doe-1’s first arrest for selling crack at the corner of Golden Gate and Hyde. Rather, Doe-1 was arrested at that same location for the same crime less than three months before, on September 10, 2014.³ At the time of his September 10 arrest, Doe-1 also had an outstanding warrant based on yet another drug-trafficking violation under California Health & Safety Code section 11352, which prohibits the

¹ Ex. 1, Declaration of Steven J. Koeninger in Support of Motion to Compel Discovery on Selective Prosecution and Enforcement (“Koeninger Disco. Mtn. Decl.”), Att. A at Ex.00420.

² *Id.*

³ *Id.* at Ex.00486-90.

1 transportation and sale of a controlled substance.⁴

2 Later that same day, an officer involved in Doe-1's arrest returned to the area of Hyde
3 and Golden Gate and "used a roll-a-tape" to confirm that the distance between where Doe-1's
4 narcotics transaction took place and the front Gate of the DeMarillac Academy was less than
5 1,000 feet.⁵ While the officer was in the process of measuring the distance between DeMarillac
6 Academy and Doe-1's drug transaction, he encountered yet *another* crack cocaine transaction "in
7 progress" between "a Latin male" and two other men in front of 288 Golden Gate Avenue – a
8 location even closer to DeMarillac Academy than 101 Hyde Street.⁶ The officer arrested the
9 "Latin male," (John Doe-2) and found "twelve individually wrapped pieces" of crack cocaine
10 and two knives on his person. As SFPD transported Doe-2 to Tenderloin Station for booking, he
11 told officers that he was a "Sureno from the south side."⁷

12 While booking Doe-2, SFPD also determined that he had an even more extensive history
13 of drug-trafficking in the Tenderloin than Doe-1. A records check revealed that Doe-2 was
14 currently on felony probation for a prior conviction under H&S Code section 11352(a) and also
15 had an outstanding, no-bail warrant related to that conviction. The incident underlying the
16 conviction occurred in June 2010 "at 370 Turk Street."⁸ The SFPD records check also revealed
17 that Doe-2 had an open case pending in Superior Court based on a May 2014 violation of section
18 11352(a) and a no-bail warrant related to that case, too. The arrest underlying that incident

19
20 ⁴ See *id.* at Ex.00489; Cal. H&S Code § 11352. The text of this motion makes numerous
references to the California Health & Safety Code, which herein is abbreviated as "H&S Code."

21 ⁵ See *id.* at Ex.00421; *id.* at Ex.00426 (incident report stating that on December 5, 2014, "I was
22 conducting an investigation pertaining to Case# 141024755 [Doe-1's incident number] which
23 involved measuring the distance between 175 Golden Gate Avenue [DeMarillac Academy] and
101 Hyde Street with a roll-a-tape measurement device").

24 ⁶ See Ex. 1, Koeninger Disco. Mtn. Decl. at Ex.00426.

25 ⁷ *Id.*

26 ⁸ *Id.* at Ex.00427. see also Ex. 1, Koeninger Disco. Mtn. Decl., Att. F at Ex.02209.1 (listing
prior cases filed against Doe-2 in San Francisco Superior Court, including arrest date and
location).

1 occurred “at 101 Hyde Street.” Finally, the records check also revealed that Doe-2 had a March
 2 2009 conviction – again for violating section 11352(a), and again based on an incident that
 3 happened in the Tenderloin.⁹

4 Although Doe-1 and Doe-2 *both* were arrested while trafficking crack cocaine within
 5 1,000 feet of the DeMarillac Academy, and although *both* had been repeatedly arrested by SFPD
 6 for drug-trafficking in the Tenderloin, *neither* of these Hispanic/Latino individuals were
 7 prosecuted in federal court under Operation Safe Schools – a program, jointly undertaken by the
 8 United States Attorney’s Office (“USAO”), the Drug Enforcement Administration (“DEA”), and
 9 the SFPD.¹⁰ Pursuant to Operation Safe Schools, SFPD/DEA taskforce officers arrested
 10 Tenderloin-based drug traffickers for prosecution in federal court under a statute prohibiting
 11 drug-trafficking within 1,000 feet of educational institutions and playgrounds – a statute that also
 12 provides for mandatory-minimum sentences. Unlike Doe-1 and Doe-2 – and hundreds of other
 13 similarly situated individuals¹¹ – all thirty-seven people prosecuted under Operation Safe Schools
 14 were **Black**. Moreover, eight of the thirty-seven Operation Safe Schools defendants were
 15 charged federally based on incidents that occurred within a mere five days of December 5,
 16 2014¹² – that is, the day of Doe-1 and Doe-2’s arrests described above.

17 Race, and not some other factor, explains the failure to include any of the non-Black drug
 18

19 ⁹ Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00427; *see also* Ex. 1, Koeninger Disco. Mtn.
 Decl., Att. F at Ex.02209.1.

20 ¹⁰ Instead, both were charged in San Francisco Superior Court. *Id.* at Ex.02202, 02209.1; *see*
 21 *also* Ex. 2, Declaration of Rob Ultan in Support of Motion to Compel Discovery on Selective
 Prosecution and Enforcement (“Ultan Disco. Mtn. Decl.”), Att. B at Ex.02519-21 (felony
 22 complaint for Doe-2).

23 ¹¹ More than 40 similarly-situated individuals (non-Black drug traffickers in the Tenderloin) are
 described in detail in this brief. *See* Section V *infra*. Hundreds more Tenderloin-based drug-
 24 trafficking arrests, involving non-Black individuals, are listed in Attachments to the Koeninger
 Declaration. *See* Ex. 1, Koeninger Disco. Mtn. Decl., Atts. B, G.

25 ¹² *See* Ex. 3, Declaration of Sheree Cruz-Laucirica in Support of Motion to Compel Discovery on
 Selective Prosecution and Enforcement (“Cruz Disco. Mtn. Decl.”), Att. A at Ex.02851-52.
 26
 27

1 traffickers in Operation Safe Schools. This fact is borne out by a varied and compelling array of
 2 evidence including:

- 3 • The statistical disparity between the racial demographics of Tenderloin drug
 4 traffickers charged in state court (61.4% Black) and those charged federally in
 5 Operation Safe Schools (100% Black) is so large that a sociologist concludes:
 “there is virtually no chance that this difference is the result of chance.”¹³
- 6 • Police reports in which Tenderloin SFPD officers admit that: “I have participated
 7 in hundreds of buy busts and surveillances in this area. I know that many of the
 8 drug dealers in the Hyde Street area are of Honduran descent. I have seen the
 described behavior hundreds of times.”¹⁴
- 9 • Declarations from community members, including a former AUSA and current
 10 law professor, a security guard for the federal courthouse, and managers from
 GLIDE and the Tenderloin Housing Clinic, attesting to the diversity of the drug
 selling population and law enforcement awareness of it.
- 11 • Hundreds of police reports in which SFPD officers arrest non-Black Tenderloin
 12 drug traffickers.
- 13 • Over 30 declarations describing a pattern of racial animus by Tenderloin police
 14 officers including the use of racial slurs (“nigger,” “black bitch,” “boy”), sexual
 15 misconduct against Black women, acts of violence against Black men and
 women, and a disparate focus on Black drug dealers.
- 16 • Use of racially inappropriate language and conduct in videos of Operation Safe
 17 Schools’ investigations.
- 18 • The fact that not all the Black defendants charged federally in Operation Safe
 19 Schools met the charging criteria set forth by the AUSAs, while similarly-situated
 non-Black persons do meet the charging criteria.

20
 21 The evidence of racial animus by Tenderloin police officers that is detailed in this motion
 22 is provided against a backdrop of longstanding concern with racial bias in the SFPD. Moreover,

23
 24 ¹³ Declaration of Galia Amram Phillips In Support Of Motion to Compel Discovery on Selective
 Prosecution and Enforcement (“Amram Disco. Mtn. Decl.”), Att. M at Ex.04220.

25 ¹⁴ Ex. 1, Koeninger Disco. Mtn. Decl., Att. D at Ex.00773. *See also id.* at Ex.00736 (officer
 26 reporting in April 2015 that “[b]ased off prior arrests and contacts, I know that the corner of
 Eddy Street and Hyde Street is primarily controlled by Honduran national drug dealers”).

the strength of the evidence of racial bias amongst the law enforcement officers in Operation Safe Schools, and the public nature of it, raises concerns with the U.S. Attorney's Office as well. The race-neutral reasons provided by the AUSAs for their charging decisions (outlined in their July 2015 Declarations) do not hold up – both because not all the Operation Safe School defendants met the charging criteria, and also because a comparative analysis of the 37 Operation Safe Schools defendants with the similarly-situated persons shows that the race-neutral reasons are pre-textual. It also appears from the AUSAs declarations and other information described below, that at the time these prosecutions were authorized, the USAO knew, or should have known, about the racial diversity of drug sellers in the Tenderloin and, at least by the 2014 sweep, knew, or should have known, that there were serious problems with racism in SFPD, and that the only people charged so far in Operation Safe Schools were Black.

This begs the question of what the USAO did to insure that the people law enforcement presented for prosecution in Operation Safe Schools actually met the charging criteria (since not all of them did), and what the USAO did to make sure that non-Black individuals not presented for prosecution did not meet the charging criteria (as many, many non-Black individuals did). None of the AUSAs Declarations state that there was any policy in place for this, and it remains unclear if the decision about whom to target was left to law enforcement – law enforcement officers whom the government had reason to suspect were racially biased.

FACTUAL BACKGROUND

I. Operation Safe Schools

A. Overview

Operation Safe Schools is a partnership between the United States Attorney's Office, the SFPD and the DEA. Declaration of Galia Phillips In Support Of Notice Of Related Case ("Phillips Related Case Decl."), Att. C [2.12.15 USAO Press Release], *United States v. Chrystal Anthony*, No. 15cr005 (N.D. Cal. filed 03/31/15) [Docket No. 11]. The stated goal of Operation

Safe Schools is to “use the law enforcement tools available to [the government] to make neighborhoods like the Tenderloin safe, and to ensure that children who live and go to school in these neighborhoods are not exposed to crime and drug dealing.” *Id.* Thus far, Operation Safe Schools consists of two sweeps of the Tenderloin neighborhood in San Francisco, CA. The first sweep was between approximately August and November 2013, and the second sweep was between approximately October and December 2014. Ex. 3, Cruz Disco. Mtn. Decl., Att. A at Ex.02851-52.

The people arrested pursuant to Operation Safe Schools were charged in the San Francisco division of the United States District Court for the Northern District of California. Each defendant was charged with selling drugs within 1,000 feet of a school, playground, or college in violation of 21 U.S.C. §§ 841 and 860.¹⁵ They face a one-year mandatory-minimum sentence under § 860 and a six-year mandatory minimum term of supervised release.¹⁶ The DEA/SFPD taskforce arrested fourteen people pursuant to Operation Safe Schools in the 2013 sweep, and twenty-three people in the 2014 sweep. Ex. 3, Cruz Disco. Mtn. Decl., Att. A at Ex.02851-52. All thirty-seven people arrested by the DEA/SFPD and charged federally under Operation Safe Schools are **Black**. *Id.*

B. Geographic Area of the Tenderloin

Press releases by the USAO stated that Operation Safe Schools focused on San Francisco’s Tenderloin neighborhood. Phillips Related Case Decl., Att. C [12.09.13 USAO

¹⁵ Section 860 applies to drug-trafficking crimes occurring within 1,000 feet of “the real property comprising a public or private elementary, vocational, or secondary school or a public or private college, junior college, or university, or a playground or housing facility owned by a public housing authority.” 21 U.S.C § 860(a). It also applies to drug-trafficking crimes occurring “within 100 feet of a public or private youth center, public swimming pool, or video arcade facility.” *Id.*

¹⁶ California law similarly provides an enhanced sentence for persons trafficking drugs within 1,000 feet of an educational institution (“elementary, vocational, junior high, or high school”). Cal. H&S Code § 11353.6. Section 11353.6, however, does **not** provide a mandatory minimum sentence. *See* Cal. H&S Code § 11353.6(f).

Press Release]; Att. D [2.12.15 USAO Press Release]. There are a number of different ways to define the Tenderloin neighborhood. SFPD's Tenderloin police district is currently bounded by the area between Geary Street, Powell Street (between Geary and Market), Market Street, 3rd Street, Mission Street, South Van Ness Avenue, Larkin Street (between Market and Golden Gate Ave., and Polk St. (between Golden Gate and Geary). Ex. 6, Declaration of August Sommerfeld in Support of Motion to Compel Discovery on Selective Prosecution and Enforcement ("Sommerfeld Disco. Mtn. Decl."), Att. A at Ex.02868, 02874 (map of Tenderloin police district). Prior to July 2015, SFPD's Tenderloin District was bounded by Larkin Street, Geary Street, and Market Street. *See id.* at Ex.02868-73, 02875 (prior map and SFPD General Order 1.02). Both before and after July 2015, the Northern police district included the area north of Geary Street. *See id.* Before July 2015, the border between the Tenderloin and Southern police districts ran along Market Street; it now runs primarily along Mission St. *See id.*

In court proceedings for Operation Safe Schools cases, the USAO has defined the Tenderloin neighborhood as the "area bounded by Geary Blvd., Van Ness Ave., Howard Street, Fifth Street and Powell Street." Order Setting Conditions of Release as to Matthew Mumhrey [Docket No. 4]. This area encompasses parts of the Tenderloin, Northern and Southern police districts. *Cf.* Ex. 6, Sommerfeld Disco. Mtn. Decl., Att. A at Ex.02869-73. Based on the SFPD District boundaries in effect when the incidents underlying the thirty-seven Operation Safe School cases occurred (*i.e.*, 2013-14), thirty-five such defendants were arrested for selling drugs in the Tenderloin District, and two were arrested for selling drugs in the Southern District. *See* Ex. 6, Sommerfeld Disco. Mtn. Decl., Att. F. For the purposes of this motion, however, the defense has defined the Tenderloin neighborhood in the same manner as the USAO has defined it in Court: the area bounded by Geary Street, Van Ness Ave. (south and north of Market Street), Howard Street, Fifth Street and Powell Street. Based on the foregoing definition of the Tenderloin, the incidents underlying all thirty-seven Operation Safe Schools cases occurred in the Tenderloin. *See id.*

Further, as illustrated by a map created by the Federal Public Defender's Office ("FPD"), almost every area of the Tenderloin falls within 1,000 feet of a playground or educational institution (elementary, secondary, vocational, and post-secondary) that apparently would be subject to 21 U.S.C. § 860(a). *See* Ex. 6, Sommerfeld Disco. Mtn. Decl. ¶ 10 & Att. D at Ex.02931 (describing and displaying map that contains pins marking the locations of various playgrounds and educational institutions and 1,000-foot-radii circles drawn around those locations). The only exception appears to be an approximately one-block-wide area that runs along 8th Street from just north of Mission to Howard Street. *See id.*

As noted above, the defense mapped the location for each of the incidents underlying the charges against the thirty-seven Operation Safe Schools defendants. *See* Ex. 6, Sommerfeld Disco. Mtn. Decl., Atts. E & F at Ex.02932-34. The defense has also created a map displaying the arrest location for all non-Black individuals charged with drug-trafficking crimes in San Francisco Superior Court between January 1, 2013 and February 28, 2015 – as contained in a dataset obtained from the Court Management System ("CMS") for the San Francisco Superior Court.¹⁷ *See* Ex. 6, Sommerfeld Disco. Mtn. Decl. ¶ 9 & Att. C at Ex.02926-30. As a comparison of the two maps makes clear, the arrest locations for non-Black individuals charged with drug-trafficking crimes in San Francisco Superior Court are intermingled extensively with the locations of the incidents underlying the charges against the thirty-seven Operation Safe Schools Defendants.

C. Types and Amounts of Drugs

The focus of Operation Safe Schools was on very low-level street drug dealers. The drugs sold include cocaine base, heroin, oxycodone, roxicodone and methamphetamine. Ex. 3, Cruz Disco. Mtn. Decl., Att. A at Ex.02851-52.

The quantity of drugs involved in Operation Safe Schools cases was minimal. For

¹⁷ A description of the CMS dataset is set forth in Section III *infra*.

example, of the 2013 Operation Safe Schools cases in which the client was represented by the Federal Public Defender (and thus the defense was able to examine the PSR or the plea agreement), the Base Offense Level used for the natural guideline calculations was the lowest possible level, level 12 - reflecting the lowest possible quantity of drugs (less than 1.4 grams in the case of crack cocaine).¹⁸ Declaration of Megan Wallstrum In Support Of Notice Of Related Case ("Wallstrum Related Case Decl."), Att. L, ¶ 2, *United States v. Chrystal Anthony*, No. 15cr005 (N.D. Cal. filed 03/31/15) [Docket No. 11-4]. This is also true for the 2014 cases in which sentencing has occurred and for which the FPD is able to examine the PSR. Ex. 4, Declaration of Megan Wallstrum in Support of Motion to Compel Discovery on Selective Prosecution and Enforcement ("Wallstrum Disco. Mtn. Decl."), ¶ 2, Att. A at Ex.02855.

Typically, drug cases involving this small quantity of drugs are not charged in federal court, and - prior to Operation Safe Schools - rarely charged in the Northern District of California. Statistics from the United States Sentencing Commission show that nationally only 2.4% of crack offenders had a Base Offense Level of 12 in 2013. In the Ninth Circuit, that rate was 2.5%. In the five years preceding Operation Safe Schools, only two people in the Northern District of California, who were sentenced for trafficking in crack cocaine, had base offense levels of 12 (for a rate of 1.2% of offenders). Phillips Related Case Decl., Att. E.¹⁹

D. How the DEA/SFPD Conducted Operation Safe Schools

The facts underlying all the Operation Safe Schools cases are similar.²⁰ For the 2013

¹⁸ In some of the PSRs, the Base Offense Level was calculated at Level 14 because the two-point increase in § 2D1.2 for selling drugs within 1,000 feet of a protected location was included in the Base Offense Level. However, the level corresponding to the amount of drugs was always 12. Wallstrum Related Case Decl., ¶2.

¹⁹ In fact, the Central District of California and the District of Columbia have both stated that they generally do not prosecute crack cases involving less than 50 grams of crack. Phillips Related Case Decl., Att. J at 16. The Operation Safe School cases which, as explained above, have a Base Offense Level of 12, involve less than 1.4g of crack cocaine. Wallstrum Related Case Decl., Att. L; U.S.S.G. § 2D1.1.

²⁰ The reports from the above-captioned Operation Safe Schools cases are appended as Attachment H of the Phillips Related Case Decl.

1 sweep, the majority of the cases used an undercover informant named “Jimmy” who bought
 2 drugs from targets. The transactions were recorded using a body camera. For the 2014 sweep,
 3 the DEA/SFPD used video surveillance of the designated target. In the videos, it appears the
 4 officers were stationed on either a nearby rooftop or a building, observing, and video-recording a
 5 specific area of the Tenderloin in which drug selling was allegedly occurring. The officers can
 6 oftentimes be heard on the video pointing out the target of the operation. Declaration of Cary
 7 Davalos In Support Of Notice Of Related Case, (“Davalos Related Case Decl.”), ¶ 2, *United*
 8 *States v. Chrystal Anthony*, No. 15cr005 (N.D. Cal. filed 03/31/15) [Docket No. 11-5].

9 Once the target of the operation was identified on video, the officers executed one of two
 10 approaches. Either an undercover officer, sometimes wearing a body camera, bought a small
 11 amount of narcotics from the target, or the officers videotaped a few apparent hand-to-hand
 12 transactions between the target and alleged drug buyers, stopped an alleged buyer soon after an
 13 apparent hand-to-hand transaction, and seized illegal narcotics from the buyer. Davalos Related
 14 Case Decl., ¶ 2. The majority of the targets were not arrested on the day of these operations.
 15 Rather, the DEA/SFPD typically made no contact with the targets, but instead arrested them on a
 16 later date on federal arrest warrants and brought them directly to federal court. Declaration of
 17 Sheree Cruz-Laucirica In Support of Notice of Related Case (“Cruz Related Case Decl.”), ¶4,
 18 *United States v. Chrystal Anthony*, No. 15cr005 (N.D. Cal. filed 03/31/15) [Docket 11-3].

19 E. Officers

20 At least forty-six law enforcement officers were involved in Operation Safe Schools.
 21 Thirty-four were SFPD officers and 1 was a Daly City officer; ten were DEA officers, and one
 22 was a U.S. Marshal assigned to the DEA. Declaration of Rob Ultan In Support of Notice Of
 23 Related Case (“Ultan Related Case Decl.”), ¶¶ 2-3, *United States v. Chrystal Anthony*, No.
 24 15cr005 (N.D. Cal. filed 03/31/15) [Docket No. 11-6]; Declaration of August Sommerfeld In
 25 Support Of Notice Of Related Case (“Sommerfeld Related Case Decl.”), Att. A (graphs showing
 26 officer involvement), *United States v. Chrystal Anthony*, No. 15cr005 (N.D. Cal. filed 03/31/15)
 27

[Docket No. 11-1]. At least some of the SFPD officers involved in Operation Safe Schools were cross-designated as federal agents. Declaration of Galia Amram Phillips In Support Of Reply to Motion to Preserve Evidence, (“Preservation Reply Decl.”) Exs. A-B, *United States v. Chrystal Anthony*, No. 15cr005 (N.D. Cal. Filed 07/13/15) [Docket No. 42]; Phillips Related Case Decl., Att. H.

Most of the Operation Safe Schools cases were generated by the same DEA and SFPD officers. For example, seven officers were involved in at least twenty of the thirty-seven cases. One officer was involved in thirty of the thirty-seven cases, while a second officer was involved in twenty-nine cases. Ultan Related Case Decl., ¶¶ 2-3; Sommerfeld Related Case Decl., Att. A.

F. Standards for Prosecution

On July 16, 2015, the U.S. Attorney’s Office filed declarations from five Assistant United States Attorneys (“AUSAs”) regarding the charging criteria and process for Operation Safe Schools. The government stated that “Operation Safe Schools grew out of [the prosecutor who initiated the Operation’s] long-term familiarity with the Tenderloin, its residents, and the drug dealing that occurred there.” *United States’ Motion Seeking Ruling On Defendants’ Claim That The Government Engaged In Selective Enforcement and Prosecution* at 6:14-16 (“Mtn. Seeking Ruling.”) [Docket No. 51]. The government said they told law enforcement to “target recidivist, repeat offenders who were selling drugs near schools and to concentrate on the criminal history of the defendants.” *Id.* at 6:20-22.

The government further claims that the two supervisory AUSAs were not aware of the race of any defendant before authorizing prosecution. *Id.* at 7:1-6. AUSA Hasib, who initiated Operation Safe Schools, says he too did “not know of the race of most of the defendants prosecuted in Operation Safe Schools.” *Id.* at 6:18-19. However the rap sheet – and often the police incident report – state the race of the defendant. *See Phillips Related Case Decl., Attachment H* (police reports of Operation Safe Schools defendants); Ex. 41, Declaration of Galia Amram Phillips in Support of Motion to Compel Discovery on Selective Prosecution and

Enforcement (“Amram Disco. Mtn. Decl.”), Att. A at Ex.03094-04144.

The two line AUSAs for the 2014 sweep, Sarah Hawkins and Lloyd Farnham, do not claim that were unaware of the race of the defendants before prosecuting them. Declaration of Sarah Hawkins In Support Of United States’ Motion (“Hawkins Decl.”) [Docket No. 51-1]; Declaration of Lloyd Farnham In Support Of United States’ Motion (“Farnham Decl.”) [Docket No. 51-2]. The Government did not provide declarations for the line AUSAs from the 2013 sweep. Moreover, the line AUSAs who brought the cases in the 2014 sweep declare that for each of the cases they brought, they were “provided an account of the individual’s conduct memorialized in a Drug Enforcement Administration Form 6, surveillance video of the drug buys taken by the San Francisco Police Department, and the criminal history of each defendant.” Hawkins Decl., ¶ 5; Farnham Decl., ¶ 5.

G. Criminal History of Operation Safe School Defendants

The criminal history of the thirty-seven Operation Safe School defendants is a wide range. While there are certainly defendants with substantial criminal history, others have minimal criminal history.²¹ Jahnai Carter has no adult criminal convictions. Ex. 41, Amram Disco. Mtn. Decl., ¶¶ 2-4. Darlene Rouse has one adult conviction, for misdemeanor petty theft, for which she got a fine and possibly one day in jail. *Id.* at Att. A, Ex.03416; Ex. 2, Ultan Disco. Mtn. Decl., ¶ 2, Att. A at Ex.02234-43. William Brown and Ashley Pharr both have one prior drug-trafficking conviction, but they are out of Alameda County, not the Tenderloin. *Id.* at Ex.04134-44, Ex.03094-3105. Darrell Powell has criminal history, but none of it is for drug trafficking. *Id.* at Ex.03383-03407. Matthew Mumphrey has one prior drug-trafficking

²¹ All of the Operation Safe Schools defendants’ rap sheets in possession of the Office of the Federal Public Defender are attached as Att. A to the Amram Disco. Mtn. Declaration (Exhibit 41). Attachment A to the Ultan Disco. Mtn. Declaration (Exhibit 2) is a chart summarizing their criminal history.

conviction, for which he received six months in jail, but it is thirteen years old. His only other conviction is eight years old, and it is for possession of an opium pipe. *Id.* at Ex.03739-64. Jamella Jules falls within Criminal History Category (CHC) II of the U.S. Sentencing Guidelines, with only one prior drug trafficking conviction from 2002. *Id.* at Ex.03548-91. Shavon Gibson is CHC I, with only one prior conviction of any kind, a drug-trafficking conviction from 2005. *Id.* at Ex.03969-95. Shaneka Clay is CHC II based on one prior drug-trafficking conviction from 2002 (a 1998 conviction was too old to count). *Id.* at Ex.03937-68.

II. Racial Demographics of Drug Traffickers in the Tenderloin

A. Needle Exchange Survey

In the spring of 2015, two experts hired by the Federal Public Defender's Office, Sheigla Murphy²² and Katherine Beckett²³ designed a survey to be administered to active drug users accessing services in the Tenderloin. The surveys were administered at the Tenderloin Needle Exchange site of the San Francisco AIDS Foundation's Needle Exchange Program with the help and supervision of Lisa Morelli, Tenderloin Site Coordinator. The site provides needle exchange supplies as well as equipment used by crack-smoking clients. A variety of services are also offered at the site. Dr. Murphy was responsible for training surveyors to conduct the survey and supervised the administration of survey for the first three weeks of data collection. Ex. 41,

²² Dr. Sheigla Murphy is the Director of the Center for Substance Abuse Studies for the Institute for Scientific Analysis in San Francisco. She received her B.A. from San Francisco State University in Interdisciplinary Social Sciences, and received her Ph.D. in Medical Sociology from the University of California, San Francisco. She has received over 25 research grants and published several books and numerous articles on sociological aspects of drug use. *See* Ex. 41, Amram Disco. Mtn. Decl., Att. M at Ex.04194-04211.

²³ Dr. Katherine Beckett is a professor in the Law, Societies & Justice Program and Department of Sociology at the University of Washington in Seattle. She received her B.A. degree from University of California, San Diego, and earned a Master's Degree and her Ph.D. from the University of California, Los Angeles. She has taught at the University of Washington since 2000, and previously taught in several other undergraduate programs around the country. Dr. Beckett has also published books and numerous articles regarding sociological aspects of crime and punishment. *See* Ex. 41, Amram Disco. Mtn. Decl., Att. L at Ex.04177-92.

1 Amram Disco. Mtn. Decl., Att. M at Ex.04216.

2 The survey was conducted on seven consecutive weeks and was administered by research
 3 assistants currently assisting Dr. Murphy with other ongoing research projects. Nicholas Lau,
 4 Sye Ok Sato, Fiona Murphy, and Sheigla Averill were trained extensively in human subject
 5 protections prior to conducting these surveys and were trained specifically for the Tenderloin
 6 needle exchange surveys by Dr. Murphy. *Id.* The purpose of the survey was to acquire
 7 additional information regarding the race/ethnicity of those who buy and sell illicit substances in
 8 the Tenderloin neighborhood. In the survey, respondents were asked to recall up to six recent
 9 drug transactions that took place in the Tenderloin neighborhood and to identify the
 10 race/ethnicity of the person from whom they obtained those drugs. Respondents were allowed to
 11 identify up to three racial categories for each drug seller. If the respondent identified either the
 12 first or second race of a drug dealer as “black,” that dealer was included in the Black category.
 13 In total, survey respondents provided information about 440 drug transactions. FPD staff then
 14 mapped each intersection/location provided by the respondents to verify that the reported drug
 15 transaction described occurred in the Tenderloin neighborhood. Through this process, fifteen
 16 surveys were excluded from the analysis. *Id.* at Ex.04217.

17 The data analysis showed that fifty-six percent of the Tenderloin drug transactions
 18 identified by survey respondents involved Black drug sellers. One-fifth (20%) of these drug
 19 transactions involved Latino drug sellers and about one in six (16.8%) involved White drug
 20 sellers. Because 100% of Operation Safe School defendants are Black, this results in a Z-score
 21 of 13.7%.²⁴ *Id.* at Ex.04221. As a result, Dr. Beckett concludes: “Statistical analyses indicates

22 ²⁴ Conventionally, social scientists consider a difference between two proportions to be
 23 statistically significant if there is a 5 percent or smaller probability that the observed difference is
 24 the result of chance. To measure the statistical significance of such differences, researchers often
 25 calculate a Z score that can be translated into a probability. Z scores are an appropriate measure
 26 of the statistical significance of differences between means when the sample sizes are large (*i.e.*,
 27 over 30). The formula used to calculate Z scores takes into account both the magnitude of the
 28 difference between proportions and the sample size. Amram Disco. Mtn. Decl., Att. M at
 Ex.04217. Z scores with an absolute value of 2 or more are considered statistically significant,
 meaning that the observed difference is very unlikely to be the result of chance. *Id.* at Ex.04219.

NOTICE OF MOTION AND MOTION TO COMPEL DISCOVERY ON SELECTIVE PROSECUTION AND
 ENFORCEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION
 CASE NO. CR 14-643 EMC

1 that these differences are highly statistically significant and extremely unlikely to be the product
2 of chance.” *Id.* at Ex.04222.

3 B. Interviews of Tenderloin Community Members

4 The results of the Needle Exchange Survey are consistent with declarations from people
5 who work and live in the Tenderloin. Leo Martinez is the Albert Abramson Professor of Law at
6 U.C. Hastings College of Law, where he has been employed since 1985. Ex. 25, Declaration of
7 Leo Martinez, ¶ 1 [Ex.03013-19]. Prior to joining U.C. Hastings, Professor Martinez served his
8 country as both a member of the U.S. Army JAG Corps and as an AUSA. *Id.* at ¶ 2. From his
9 current office, Professor Martinez has windows facing out on Golden Gate Avenue and its
10 intersection with Hyde Street. *Id.* at ¶ 6-7. Based upon his observations, “the races of those
11 engaged in what appears to be drug activity on this corner are two-thirds African American and
12 one-third Hispanic. This has remained pretty much constant over the years of my observations.”
13 *Id.* at ¶ 8. Professor Martinez has also noticed San Francisco Police Department officers in the
14 hallway outside of his current office location (and on a few occasions they have used his office)
15 looking through the windows in the direction of the drug sales activity occurring on the
16 northwestern corner of Golden Gate Avenue and Hyde streets. *Id.* at ¶ 9.

17 Arthur Sandoval is a security guard at this federal courthouse at 450 Golden Gate Ave.,
18 and at 50 U.N. Plaza, where the majority of his shifts take place. As part of his job, he walks
19 around the perimeter of the building to ensure that it is safe and secure. The building is in close
20 proximity to Civic Center BART station and U.C. Hastings College of the Law. Mr. Sandoval
21 has observed substantial drug trafficking occur directly in front of, and around, 50 U.N. Plaza.
22 “The drug trafficking is constant there.” Ex. 26, Declaration of Arthur Sandoval, ¶¶ 1-3
23 (Ex.03020-25). Based on his own observations while working at 50 U.N. Plaza:

24 the vast majority of drug dealers in the area are Hispanic. They’ve dominated the
25 drug trafficking there for the entirety of the time that I have worked at this
26 location. In addition, Hispanics appear to dominate the drug trafficking within a
27 three to four block radius of the federal building. The majority of these drug

dealers are young and consist of both men and women. Some of them appear organized in that they work in pairs and they use the physical landscape such as bushes to hide their drugs in. I have also observed drug dealers conceal narcotics inside of their mouths. Crack cocaine is one of the more popular drugs that is sold there.... The San Francisco Police Department is aware of the drug trafficking that takes place near 50 UN Plaza. They conduct surveillance of the drug trafficking from inside the building. They have access to a room that is located on the first floor. The room has two large windows with a clear view of the courtyard that is directly in front of the building. The courtyard is where the majority of the drug trafficking takes place near the building.

Id. at ¶¶ 4-5.

Paul Harkin is the program manager for GLIDE Health Services HIV and Hepatitis C programs. He has worked in the Tenderloin for fifteen years. As part of his job, he runs street outreach in the Tenderloin, checking on participants and offering sterile syringes. Ex. 32, Declaration of Paul Harkin, ¶¶ 1-3 (No. Ex.03047-52). He declares that “there has always been, and continues to be, a diversity in the racial and ethnic makeups of the persons I have witnessed dealing controlled substances in the Tenderloin. Some are white, some black, some Latino, some Asian and some Pacific Islanders.” *Id.* at ¶ 5. Moreover, Harkin has “found that drug dealers of the same ethnic group tend to work the same areas of the Tenderloin. For example, most recently, Leavenworth has Honduran and Mexican drug dealers, Golden Gate Avenue has Whites and African Americans above Jones Street and just African Americans at Jones Street and below, and Hyde Street has Mexicans regularly dealing there.” *Id.* at ¶ 7.

Deanna Brown has worked in the Tenderloin for over ten years. She currently works at the Elk Hotel at 670 Eddy Street. Ex. 27, Declaration of Deanna Brown, ¶ 1 (Ex.03026-28). She states:

While employed at the Elk Hotel, I have observed substantial drug trafficking activity in front of and near the hotel. Specifically, for the past five years or more, I have witnessed Latino men and women sell drugs in front of and near the hotel on a daily basis ... The Latino men and women who sell drugs near the Elk Hotel appear to be organized in shifts. That is, during the day time, there is a particular group of seven to eight males and three to four women that sell drugs in front of and near the hotel. Towards the evening, a different group of approximately twelve males and two females replaces that day time group and

1 continue to engage in drug trafficking. I have also witnessed at least two
 2 Caucasian individuals regularly sell methamphetamine to white patrons or
 3 residents of the Elk Hotel. I have contacted the San Francisco Police Department
 4 on numerous occasions to report drug activity in front of the Elk Hotel, because
 5 hotel management understandably does not want drug activity to occur in front of
 6 or near the premises. Because the Elk hotel has a video surveillance system
 7 focused on Eddy Street, I have regularly been able to witness drug trafficking
 8 activity and safely report it to the San Francisco Police Department. In the past, I
 9 have asked the various Latino drug dealers to please move away from the Elk
 10 Hotel and to sell their drugs elsewhere. In response to this and my repeated
 11 telephone calls to the police, condiments and trash was placed or thrown on my
 12 car. The drug activity and race of persons who sell drugs near the Elk Hotel has
 13 not changed significantly since the fall of 2013. Latino drug dealers have
 14 dominated the drug trafficking in that area for the entirety of the time that I have
 15 worked at the Elk Hotel.

16 Ex. 27, Declaration of Deanna Brown, ¶¶ 2-7.

17 Tabitha Allen has been employed at the Tenderloin Housing Clinic (THC) in San
 18 Francisco, California since 2009, where she is currently the Director of Programs at THC.
 19 Initially, she worked at THC's office at 398 Eddy Street but in 2001, she moved to working in
 20 THC's office space at 449 Turk Street. Ex. 28, Declaration of Tabitha Allen, ¶¶ 2-6 (Ex.03029-
 21 33). She declares:

22 Throughout my many years in the Tenderloin I have observed that there are
 23 different racial groups involved in the local drug trade. They do not mix with one
 24 another, often African American dealers control one block while Hispanic dealers
 25 control another.

26 While working at THC's Eddy Street office I typically walked up from the BART
 27 station via Leavenworth Street. During my walk up Leavenworth I was aware
 28 that drug dealers were selling drugs. These blocks were primarily occupied by
 African American people selling drugs.

When I moved to THC's Turk Street location in 2011 I began walking up Hyde
 Street to get to work. There are a lot of Hispanic dealers on the blocks between
 BART and Turk Street.

THC has managed the Edgeworth Hotel on O'Farrell Street since 2013. We have
 managed the Elk Hotel at Polk Street since 2006. During my time at THC,
 Hispanic dealers have been present in both these areas.

Enforcement of the drug trade in the Tenderloin varies based on who is placing pressure on the police. THC has tried to build good relationships with the police in order to receive attention when we need policing in front of our buildings. Typically, they will be responsive and present for a week or some period of time, until things return to normal and then we ask for help again.

Ex. 28, Declaration of Tabitha Allen, ¶¶ 2-6.

III. Racial Demographics of Tenderloin Drug Traffickers Charged in State Court

In addition to analyzing the needle exchange survey discussed at section II.A *supra*, Dr. Beckett analyzed charging data from San Francisco County Superior Court with respect to drug-trafficking crimes between January 1, 2013 and February 28, 2015. The data Dr. Beckett analyzed was provided by the FPD, which obtained the data from the Court Management System (“CMS”) for the San Francisco County Superior Court. The CMS is a database which serves as the repository for all data related to the processing of criminal cases, filed in San Francisco County Superior Court, from the time of arrest until the time of disposition. Ex. 40, Declaration of William Roth (“Roth Decl.”) ¶ 1 at Ex.03084-88. Among other things, the CMS includes data regarding the race of each defendant. *See id.* ¶ 3. With the sponsorship of the San Francisco Public Defender’s Office, the FPD requested a CMS report/spreadsheet listing drug-trafficking cases charged in San Francisco (citywide) between January 2009 and April 2015. *Id.* ¶ 4-5; Ex. 1, Koeninger Disco. Mtn. Decl. ¶ 6. For purposes of the report/spreadsheet, the FPD defined “drug-trafficking case” as any case charging any of the following code sections:

- California Health & Safety Code section 11351
- California Health & Safety Code section 11351.5
- California Health & Safety Code section 11352
- California Health & Safety Code section 11358
- California Health & Safety Code section 11359
- California Health & Safety Code section 11360
- California Health & Safety Code section 11375

- 1 • California Health & Safety Code section 11378
- 2 • California Health & Safety Code section 11378.5
- 3 • California Health & Safety Code section 11379

4 Ex. 40, Roth Decl. ¶ 4; Ex. 1, Koeninger Disco. Mtn. Decl. ¶ 6. These code sections prohibit
 5 trafficking of various controlled substances, including possession of a controlled substance for
 6 sale. The CMS report/spreadsheet requested by the FPD also included data, for each case,
 7 regarding the following:

- 8 • Court Number
- 9 • Arrest Date
- 10 • Arrest Location
- 11 • SFPD Incident Number
- 12 • Defendant's Name
- 13 • Defendant's Race
- 14 • Filed Charge
- 15 • Current Charge

16 Ex. 40, Roth Decl. ¶ 4; Ex. 1, Koeninger Disco. Mtn. Decl. ¶ 6.

17 The FPD received the completed CMS report/spreadsheet in September 2015. *See* Ex.
 18 40, Roth Decl. ¶ 5; Ex. 1, Koeninger Disco. Mtn. Decl. ¶ 7. In order to combine the CMS data
 19 with important information about the arrests underlying each drug-trafficking case reflected
 20 therein, FPD staff obtained SFPD incident data from the City of San Francisco's "SF OpenData"
 21 website, which is self-described as "the central clearinghouse for data published by the City and
 22 County of San Francisco."²⁵ *See* Ex. 6, Sommerfeld Disco. Mtn. ¶ 4. FPD staff downloaded
 23 data regarding all drug/narcotic incidents that occurred between January 1, 2013 and February
 24 28, 2015; included in the downloaded data was the SFPD incident number for each incident, as

25 ²⁵ *See* <https://data.sfgov.org/> (lasted visited November 25, 2015)

1 well as its geographic coordinates. *See id.* ¶¶ 4-6. Using software designed for statistical
 2 analysis (SPSS), FPD staff then used the SFPD incident number to merge the CMS data and the
 3 SFPD incident data. *See id.*

4 After merging these datasets, FPD staff first removed from the CMS data all cases that
 5 were not associated with incidents occurring between January 1, 2013 and February 28, 2015
 6 (because unlike the data downloaded from the SF OpenData website, the CMS data was not
 7 limited to these dates). *Id.* ¶ 7. Next, to isolate cases that stemmed from incidents that took
 8 place in the Tenderloin neighborhood, FPD staff removed all data entries that fell outside of the
 9 relevant geographic coordinates (using the northernmost, easternmost, southernmost and
 10 westernmost points of the Tenderloin).²⁶ *See id.* (detailing this process). FPD staff then
 11 imported the resulting dataset into a computer program named Tableau, which allowed the FPD
 12 to see each data point on a map (and, therefore, in relation to Tenderloin street boundaries). *See*
 13 *id.* FPD staff manually eliminated any data point that fell outside of the street boundaries of the
 14 Tenderloin. *Id.* Finally, FPD staff identified 248 entries contained in the CMS data that did not
 15 have a corresponding match in the SF OpenData (and, therefore, were not paired with the
 16 geographic-coordinate data from the SF OpenData website). *See id.* ¶ 8. However, the CMS
 17 data did contain arrest-location data; using this data, FPD staff manually researched the arrest
 18 location for each of the 248 entries using Google Maps. *Id.* If the arrest location fell within the
 19 geographic area of the Tenderloin (as defined above), that case was retained. *See id.*

20 The result of the foregoing was a dataset that included information regarding CMS drug-
 21 trafficking cases that were: (a) charged in San Francisco Superior Court between January 1, 2013
 22 and February 28, 2015; and (b) based on SFPD incidents that occurred in the Tenderloin. This
 23 dataset/spreadsheet of CMS data was provided to Dr. Beckett, who analyzed the data. *See Ex. 1,*

24 ²⁶ For the reasons explained *supra* at Background Section I.B, FPD staff defined the
 25 “Tenderloin” as the area bounded by the following: Van Ness Avenue (north and south of
 26 Market Street); Geary Boulevard; Powell Street; 5th Street; and Howard Street. FPD staff used
 27 Google maps to find the northern, southern, western, and eastern most points of the above-
 28 described boundaries (37.787924, 37.770202, -122.422042, -122.404582).

2013 and February 28, 2015. *Id.* A discussion of Dr. Beckett's analysis follows.

The racial categories employed by the CMS data include: Black, White, Japanese, Chinese, Mexican, Filipino, Other and Unknown. *Id.*; *see also* Ex. 40, Roth Decl. ¶ 3 at Ex.03084-88 (describing common race codes contained in CMS). The race of the suspect was not identified (i.e. unknown) in a non-trivial number of arrests (56, or 6.9% of all arrests). Ex. 41, Amram Disco. Mtn. Decl., Att. M at Ex.04215. In order to identify Hispanics that were racially classified as White, Other or Unknown, Dr. Beckett employed Hispanic Surname Analysis (HAS) to estimate the proportion of SFPD arrestees in these racial categories who identify as Latino. This program utilizes the U.S. Census Spanish Surname database and assigns a numeric value between 0 and 1 to all surnames in that database. These numeric values represent the probability that a given surname corresponds to persons who identified themselves as Hispanic/Latino in the 1990 U.S. Census.²⁷ The list used to identify defendants of Hispanic origin here contains 12,497 different Spanish surnames that are classified by the Census Bureau as "Heavily Hispanic." The resulting Latino category includes two groups of people: 1) people who were racially classified by SFPD as Mexican; and 2) people who were racially identified as White, Other, or unknown, but were identified as Hispanic through HSA. *Id.*

Data analysis indicates that a majority (61.4%) of those arrested in the Tenderloin in the relevant time period and subsequently charged in Superior Court with drug trafficking are Black. Approximately one-fourth (24.7%) of these arrestees were Latino, and just over one in ten (10.7 percent) were White. Thus, while approximately six of ten arrestees charged with drug trafficking in San Francisco County Superior Court were Black, all of those arrested through Operation Safe Schools and facing federal charges were Black. Table 1 below assesses the statistical significance of this difference in proportions.

//

²⁷ Word, David L., & R. Colby Perkins Jr., BUILDING A SPANISH SURNAME LIST FOR THE 1990S (A NEW APPROACH TO AN OLD PROBLEM), Technical Working Paper No.13. Washington, D.C.: Population Division, U.S. Census Bureau, 1996.

Table 1. Statistical Significance of Difference between the Proportion of Operation Safe Schools Arrestees and SFPD Arrestees Charged in Superior Court who are Black				
	Operation Safe School Arrestees	SFPD Arrestees Charged in Superior Court	Absolute Difference in Percent Black	Z-Score
Black Proportion	100% (37/37)	61.4% (489/796)	38.6% (100%-61.4%)	17.5*

*Indicates a statistically significant disparity ($Z > 2$ or $Z < -2$).

Beckett explained that Z scores with an absolute value of 2 or more are considered statistically significant, meaning that the observed difference is very unlikely to be the result of chance. The Z –Score shown in Table 1. (17.5) means that the difference in the proportion of Operation Safe School and Superior Court drug trafficking arrestees who are Black is highly statistically significant, and that there is virtually no chance that this difference is the result of chance. *Id.* at Ex.04217-19.

IV. Law Enforcement Knowledge of Non-Black Drug Traffickers in the Tenderloin

In addition to the above-discussed evidence demonstrating the racial diversity of drug traffickers in the Tenderloin, there is substantial evidence that SFPD was aware of the consistent presence of non-Black drug traffickers in the Tenderloin. This is particularly true with respect to Hispanic/Latino drug traffickers. Indeed, various incident reports obtained by the FPD demonstrate SFPD’s particular awareness of the presence, behavior, and specific geographic locations frequented by Hispanic/Latino dealers.

For example, multiple SFPD incident reports describe drug-trafficking along Hyde Street as generally controlled by Hispanic dealers. As explained by one officer working an April 2013 plainclothes detail in “the 200 block of Hyde Street”:

I have participated in hundreds of buys [sic] busts and surveillances in this area. I know that many of the drug dealers in the Hyde Street area are of Honduran descent. I have seen the described behavior hundreds of times. I know the drug dealers in the area keep the dope in their mouth in order to conceal and protect it.

1 Ex. 1, Koeninger Disco. Mtn. Decl., Att. D at Ex.00773. *See also id.* at Ex.00736 (officer
2 reporting in April 2015 that “[b]ased off prior arrests and contacts, I know that the corner of
3 Eddy Street and Hyde Street is primarily controlled by Honduran national drug dealers”).

4 While describing his September 2013 investigation of a “group of five Hispanic men”
5 standing at the corner of Eddy and Hyde Streets, another SFPD officer described the area as
6 follows:

7
8 Over the last three years I have personally witnessed numerous Hispanic
9 individuals that stand on that street corner for hours at a time. I have personally
10 witnessed the same individuals stand on that street corner from the time I start
11 work at 2100 hrs and the same individuals are there at 0400 hrs in the morning. I
12 have directed Tenderloin officers to focus their attention on the drug dealers on
13 that corner and the officers have made numerous drug arrests there.

14 Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00539.

15 The corner of Golden Gate Avenue and Hyde Streets was similarly known to SFPD for
16 the presence of Hispanic drug dealers. As one officer explained in August 2014:

17 I responded to the area of Golden Gate and Hyde St. on a report of multiple drug
18 dealers in the area. Tenderloin Police Station receives several complaints
19 everyday [sic] regarding narcotics sales and use in this area. Officer Celis and I
20 have made multiple arrests in this area for narcotics sales in specific to [sic] base
21 rock cocaine. Officer Celis and I have also spoken to multiple business owners
22 and residents in the area who have complained that they feel threatened by Latin
23 drug dealers who blatantly sell “Crack” on the streets.

24 *Id.* at Ex.00272. Hispanic drug dealers were known to frequent other nearby areas, too:

25 We traveled by a donut store located on the northeast corner of Golden Gate
26 Avenue and Larkin Street. The area of Golden Gate Avenue and Larkin Street is
27 an area that is well known for narcotics sales. Northern Station receives numerous
28 complaints regarding Hispanic males selling crack cocaine on Golden Gate
Avenue between Polk Street and Van Ness Avenue. Officer Peterson and I have
seen many of the suspected narcotics dealers loitering inside the donut shop
located on the northeast corner of Golden Gate Avenue and Larkin Street.

Ex. 41, Amram Disco. Mtn. Decl., Att. O at Ex.04267. *See also* Ex. 1, Koeninger Disco. Mtn.

Decl., Att. A at Ex.00643-44 (officer detailing narcotics surveillance at Civic Center Plaza focusing on “several Latin males who all appeared to know each other and pace back and forth along the sidewalk”).

In addition to incident-report references to Hispanic drug traffickers in the Tenderloin, it is beyond dispute that SFPD was generally aware of the presence non-Black drug traffickers in this area. Based on the CMS data described above, the FPD has identified hundreds of Superior Court cases that involve non-Black individuals who were arrested for drug-trafficking crimes in the Tenderloin between January 2013 and February 2015 (and subsequently charged in Superior Court). *See* Ex. 1, Koeninger Disco. Mtn. Decl., Att. G at Ex.02210-31. Via public records requests, the FPD also obtained numerous SFPD incident reports detailing the arrest of non-Black individuals for drug-trafficking crimes in the Tenderloin in 2013 and 2014 – a significant number of whose arrests did not result in Superior Court charges. *Cf. id. with* Ex. 1, Koeninger Disco. Mtn. Decl., Att. B. This data, obtained from criminal-justice-related entities in San Francisco, shows that the presence of non-Black drug-traffickers in the Tenderloin is anything but an anomaly.

V. Law Enforcement Interaction With, and Arrests of, Non-Black Drug Traffickers in the Tenderloin

In light of the substantial evidence demonstrating the consistent and established presence of non-Black drug traffickers in the Tenderloin, it is unsurprising that SFPD arrested numerous non-Black persons for committing drug-trafficking crimes in the Tenderloin in recent years. Indeed, focusing on the time-period between January 1, 2013 and February 28, 2015, defense counsel has identified hundreds of such drug-trafficking arrests made by SFPD. First, the CMS data obtained by the FPD identifies more than 300 instances in which a non-Black individual was charged with a drug-trafficking crime in San Francisco Superior Court (along with

corresponding arrest dates and the SFPD incident numbers underlying those criminal cases). *See* Ex. 1, Koeninger Disco. Mtn. Decl. ¶¶ 9-10 & Att. G. Second, through public records requests directed at SFPD, the defense obtained incident reports detailing more than 100 instances in which non-Black individuals were arrested for drug-trafficking crimes in the Tenderloin. *See* Ex. 1, Koeninger Disco Mtn. Decl. ¶¶ 2-4, Att. A-C. At least fifty of these incidents did not result in Superior Court charges (as reflected in the CMS data). *Compare* “Name” and “Incident Number” reflected in Ex. 1, Koeninger Disco. Mtn. Decl., Att. B *with* “Defendant Name” and “Incident Number” reflected in Ex. 1, Koeninger Disco. Mtn. Decl., Att. G.²⁸

As discussed in the Argument section *infra*, the defense contends that all of these non-Black, Tenderloin-based drug traffickers constitute “similarly situated” persons for purposes of the constitutional guarantee of equal protection. Nevertheless, to illustrate the disparate treatment experienced by the thirty-seven Operation Safe Schools defendants, the defense has selected approximately forty non-Black, Tenderloin-based drug traffickers for a more detailed discussion here. Many of these individuals have extensive histories of drug-trafficking in the Tenderloin (and San Francisco generally) and/or were well-known to SFPD officers in the area. Moreover, in numerous instances, the investigating SFPD officers actually made specific reference to the fact that the drug transactions at issue occurred in close proximity to a school or children’s recreation center.²⁹ *See, e.g.*, discussion of Doe-1, Doe-2, Doe-7, Doe-10, Doe-20, Doe-21, Doe-22 *infra* and in Introduction *supra*. Of course, none of these non-Black drug

²⁸ There is good reason to believe that additional public records requests to SFPD would reveal additional incidents in which non-Black individuals were arrested for drug trafficking in the Tenderloin. This is because the FPD’s initial public records request was limited to those incidents identified by the SF OpenData website as involving the Tenderloin police district. Ex. 1, Koeninger Disco. Mtn. Decl. ¶ 2. However, the geographic area of the Tenderloin is larger than the SFPD District. *See* Ex. 6, Sommerfeld Disco. Mtn. Decl. ¶ 3 & Att. A. The FPD’s public records request was also limited by timeframe (August-to-December 2013 and August-to-December 2014).

²⁹ While some incident reports actually discuss a transaction’s proximity to a school, nearly every portion of the Tenderloin in which the various non-Black drug traffickers were arrested falls within 1,000 feet a playground or educational institution covered by 21 U.S.C. § 860. *See* Ex. 6, Sommerfeld Disco. Mtn. Decl. ¶ 10 & Att. D.

1 traffickers were charged federally under Operation Safe Schools.

2 A. John Doe-1

3 As detailed in the Introduction, *supra*, the December 5, 2014 arrest of [REDACTED]
 4 (“John Doe-1”) was not the first time that SFPD had arrested Doe-1 for selling crack cocaine in
 5 the Tenderloin. Just three months earlier, on September 10, 2014, SFPD officers arrested Doe-1
 6 after observing him sell crack cocaine to at least three different people near the corner of Hyde
 7 Street and Golden Gate Avenue. Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00489.
 8 Further, the officers who arrested Doe-1 that day “recognized [Doe-1] from a prior Base Cocaine
 9 Sales arrest” from March 2013. *Id.* Indeed, after booking Doe-1 at Tenderloin Station, the
 10 officers’ “further investigation showed” that Doe-1 had an outstanding warrant based on a prior
 11 drug sales violation under H&S Code section 11352. *Id.*
 12

13
 14 B. John Doe-2

15 SFPD’s December 5, 2014 arrest of [REDACTED]
 16 [REDACTED] (“John Doe-2”) – discussed above in the Introduction – represented
 17 one of the more recent³⁰ in Doe’s lengthy history of drug-trafficking crimes in the Tenderloin.
 18 When arrested in December 2014, Doe-2 had an open court case related to his May 27, 2014
 19 drug-trafficking arrest at 101 Hyde Street. *Id.* at Ex.00427. On that occasion, an SFPD officer
 20 engaged in a “buy bust” operation approached an “unknown latin male” (Doe-2) and purchased
 21 crack cocaine from him. Ex. 41, Amram Disco. Mtn., Att. O at Ex.04243. During booking,
 22 officers discovered that Doe-2 “was on active probation . . . for selling narcotics” based on a
 23 2010 conviction under H&S Code section 11352. *Id.* Doe-2 was later charged under H&S Code
 24

25
 26 ³⁰ Doe-2 was arrested again on July 3, 2015, after officers encountered him and discovered he
 27 had “three active felony warrants.” *Id.* at Ex.00430.

1 sections 11351.5 and 11352(a). Ex. 2, Ultan Disco. Mtn. Decl., Att. B at Ex.02529.

2 The incident underlying Doe-2's 2010 conviction also took place in the Tenderloin.
3 Specifically, on June 29, 2010, SFPD officers conducting a "buy bust" operation saw Doe-2
4 engage in a hand-to-hand narcotics transaction at 370 Turk Street. Ex. 41, Amram Disco. Mtn.
5 Att. O at Ex.04234. An undercover officer then approached Doe-2 and bought a rock of crack
6 cocaine from him. *Id.* Doe-2 was subsequently charged in Superior Court with violating H&S
7 Code section 11352(a). Ex. 2, Ultan Disco. Mtn. Decl., Att. B at Ex.02538. The felony
8 complaint also alleged that Doe-2 committed the offense after a prior section 11352(a)
9 conviction from March 2009. *Id.*
10

11 The incident which lead to Doe-2's 2009 drug-trafficking conviction also occurred in the
12 Tenderloin – specifically, at 416 Turk Street on March 11, 2009. Ex. 1, Koeninger Disco. Mtn.
13 Decl., Att. F at Ex.02209.1; Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00427. Based on
14 that arrest, Doe-2 was charged with violating H&S Code section 11352(a). Ex. 2, Ultan Disco.
15 Mtn. Decl., Att. B at Ex.02550-01. Doe-2 subsequently pleaded guilty to a felony violation of
16 section 11352(a). *Id.* at Ex.02548.
17

18 C. John Doe-3

19 [REDACTED]
20 SFPD officers arrested "a white male named [REDACTED] ("John Doe-3") in
21 November 2013 and December 2014. Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00357;
22 *see also id.* at Ex.00185-00194; Ex.00349-00358. Both arrests occurred in the Tenderloin (284
23 Golden Gate Avenue and the corner of Hyde and Fulton Streets, respectively). *Id.* at Ex.00185-
24 00194; Ex.00349-00358. On both occasions, Doe-3 was found in possession of a substantial
25 amount of methamphetamine. *Id.* at Ex.00185-00194; Ex.00349-00358.

26 The first arrest occurred on November 3, 2013. *Id.* at Ex.00185. Leading up to that
27

1 incident, officers had received a tip that Doe-3 “was staying at the Earle Hotel” and “was selling
2 a large amount of methamphetamine.” *Id.* at Ex.00192. The officers “knew [Doe-3] from prior
3 methamphetamine investigations” and learned that he was on “CDC parole” for a previous
4 conviction under section “11378 H&S (Possession for Sales of a Controlled Substance).” *Id.*
5 Additionally, the officers learned that Doe-3 was “on felony probation out of San Francisco for
6 11378 H&S . . . with a warrantless search and seizure condition.” *Id.* The officers traveled to
7 284 Golden Gate Avenue, confirmed that Doe-3 was staying at the Earle Hotel, and went to his
8 room to “conduct a probation/parole search.” *Id.* During their search, officers discovered: 263.4
9 grams (gross) of methamphetamine; 4.3 grams (gross) of “MDMA/Ecstasy”; unknown
10 miscellaneous pills; sandwich bags; a digital scale; two cell phones; and \$6,728. *Id.* at
11 Ex.00187-00193. Doe-3 was booked and later charged in Superior Court with violating H&S
12 Code sections 11366 and 11378. Ex. 1, Koeninger Disco. Mtn. Decl., Att. F at Ex.02159.

13 Doe-3’s second arrest occurred approximately one year later on December 18, 2014. Ex.
14 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00349-00358. SFPD had again received a tip that
15 Doe-3 “was selling methamphetamine in the city and county of San Francisco,” and a records
16 check revealed that he was “on PRCS [post release community supervision]” with a warrantless
17 search condition “for the possession for sales of methamphetamine.” *Id.* at Ex.00357. From an
18 address in the Bayview, undercover officers followed Doe-3 as he boarded a MUNI train and
19 traveled to the Civic Center. *Id.* Officers then detained Doe-3 at Hyde and Fulton Streets,
20 searched his backpack, and found: 53.3 grams (gross) of methamphetamine; plastic baggies; and
21 a digital scale. *Id.* At that time, Doe-3 told officers that he had additional methamphetamine in a
22 “black case” at the residence where he was staying. *Id.* After obtaining a warrant, officers went
23 to the residence, searched the black case, and found an additional 38.5 grams (gross) of
24 methamphetamine, packaging materials, and \$4,980. *Id.* at Ex.00357-00358. Based on this
25 arrest, Doe-3 was again charged in Superior Court with violating H&S Code sections 11366 and
26 11378. Ex. 1, Koeninger Disco. Mtn. Decl., Att. F at Ex.02159.

27
28 NOTICE OF MOTION AND MOTION TO COMPEL DISCOVERY ON SELECTIVE PROSECUTION AND
ENFORCEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION
CASE NO. CR 14-643 EMC

1 Prior to the above-described incidents, Doe-3 had previously faced drug-trafficking
2 charges in S.F. Superior Court on at least two separate occasions: June 2012 (H&S Code section
3 11378) and November 2010 (H&S Code sections 11378 and 11379). *Id.*

4 D. John Doe-4

5 In 2014 alone, the SFPD arrested [REDACTED] ("John Doe-4") on at least three
6 occasions for trafficking crack cocaine in the Tenderloin. The most recent arrest occurred on
7 September 12, 2014. Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00300. While patrolling
8 that day, officers saw Doe-4,³¹ and at least one officer recognized Doe-4 because he had
9 previously arrested Doe-4 on May 19, 2014 for "11351.5 H&S – possession of cocaine base for
10 sales." *Id.* The officer further noted that "earlier that day," Doe-4 had been in court for "another
11 cocaine base sales case, case number 140141700." *Id.* That case was based on a February 17,
12 2014 arrest. Ex. 1, Koeninger Disco. Mtn. Decl., Att. F at Ex.02139.

13 Doe-4's September 2014 arrest occurred after officers observed him engaged in narcotics
14 trafficking near the intersection of Hyde and Fulton Streets. Ex. 1, Koeninger Disco. Mtn. Decl.,
15 Att. A at Ex.00300. While being detained, Doe-4 spat three plastic-wrapped bindles of crack
16 cocaine from his mouth. *Id.* Doe-4 was subsequently booked and charged with violating section
17 11351.5. *Id.*; Ex. 1, Koeninger Disco. Mtn. Decl., Att. F at Ex.02139.

18 Doe-4 was arrested by SFPD on May 19, 2014 as well. Ex. 1, Koeninger Disco. Mtn.
19 Decl., Att. D at Ex.00781-2. This arrest occurred in the Tenderloin at United Nations Plaza. *Id.*
20 Suspecting that Doe-4 was selling crack cocaine, officers detained him, and Doe-4 spit twelve
21 individually wrapped crack rocks from his mouth. *Id.* at Ex.00784. The reporting officer further
22 noted that Doe-4 "was in court earlier today for an arrest for selling cocaine base which occurred
23 on 2/17/14 at a nearby intersection, Hyde St and Golden Gate Ave, case 140141700." *Id.* Doe-4
24 was subsequently booked and charged under section 11351.5. *Id.* at Ex.00782; Ex. 1, Koeninger
25

26 ³¹ The police incident report identifies Doe-4 as Hispanic ("H").

Disco. Mtn. Decl., Att. F at Ex.02139.

Finally, Doe-4 was also charged with violating section 11351.5 based on the February 17, 2014 arrest referenced above. Ex. 2, Ultan Disco. Mtn. Decl., Att. B at Ex.002762. This arrest occurred in the Tenderloin, too (the intersection of “Hyde St and Golden Gate Ave”). Ex. 1, Koeninger Disco. Mtn. Decl., Att. D at Ex.00784; Ex.00741. After observing Doe-4 sell a woman one rock of crack, officers arrested him; they recovered ten crack rocks from Doe-4’s mouth and \$132 from his pocket. *Id.* at Ex.00741. The officers also detained the woman who purchased crack from Doe-4. *Id.* at Ex.00746. She described Doe-4 as the “Honduran male wearing a base ball [sic] hat” who “looks like Bruno Mars”; the woman stated that she buys “from Bruno Mars all the time.” *Id.*

E. Jane Doe-5

On August 15, 2014, SFPD officers received a tip from a “citizen informant” stating that “there is narcotics activity coming from 120 Hyde Street #16 in the City and County of San Francisco.” Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00659. The resident of that address was [REDACTED] (“Jane Doe-5”),³² and her identity was confirmed by the informant. *Id.*

SFPD officers learned that Doe-5’s “rap sheet indicated prior methamphetamine related arrests and convictions,” both for trafficking (H&S Code section 11378) and for simple possession (H&S Code section 11377(a)). *Id.* Doe-5 also was “on felony probation” based on a section 11378 conviction, and the officers called her probation officer to confirm her probationer status and her residence at 120 Hyde Street. *Id.* SFPD then traveled to Doe-5’s residence and knocked on her door. *Id.* In response to the officers’ inquiries, Doe-5 admitted to having “an eight ball on [her] bed.” *Id.* A subsequent search of Doe-5’s person and apartment yielded the following: seven press-lock baggies of methamphetamine totaling 31.4 grams (gross); a prescription bottle (in another person’s name) containing twenty suspected oxycodone pills; a

³² The relevant SFPD incident report identifies Doe-5 as White (“W”).

1 digital scale; packaging materials (ninety-three smaller press-lock baggies); and \$893. *Id.* at
 2 Ex.00659-00660. Doe-5 was arrested and transported to Tenderloin Station for booking. *Id.* at
 3 Ex.00659.

4 As a result of the foregoing, Doe-5 was charged in Superior Court with violating, *inter*
 5 *alia*, H&S Code section 11378. Ex. 1, Koeninger Disco. Mtn. Decl., Att. F at Ex.02141. This
 6 was not the first occasion on which Doe-5 faced drug-trafficking charges in San Francisco. In
 7 both September 2011 and December 2005, Doe-5 was charged in S.F. Superior Court with
 8 violating H&S Code sections 11351 and 11378. *Id.*

9 F. John Doe-6

10 When SFPD officers arrested [REDACTED] (“John Doe-6”) on November 19, 2013 for
 11 selling crack cocaine near the intersection of Hyde and Grove Streets, it represented Doe-6’s
 12 third arrest in less than four months for dealing crack in the Tenderloin. Ex. 1, Koeninger Disco.
 13 Mtn. Decl., Att. A at Ex.00229. The other two arrests occurred on August 1, 2013 (O’Farrell and
 14 Larkin Streets) and July 27, 2013 (Polk and Olive Streets), and both resulted in state court
 15 charges. *Cf. id.* (identifying court case numbers) *with* Ex. 1, Koeninger Disco. Mtn. Decl., Att. F
 16 at Ex.02174 (listing court case numbers, dates of arrest, and location of arrest).

17 In the moments leading up to Doe-6’s November 2013 arrest, an officer surveilling the
 18 area of Hyde and Grove saw Doe-6 and recognized him “from prior police contacts, which
 19 include arrests for sales of base cocaine, and possession of base cocaine for sale” (the August
 20 2013 and July 2013 arrests). *Id.* “[F]rom these two prior arrests,” the officer knew that Doe-6
 21 “dealt off white rocks of base cocaine from his mouth.” *Id.* The officer then saw Doe-6 engage
 22 in a suspected drug transaction with another male by bringing “his right hand to his mouth and
 23 spit[ting] out an unknown object.” *Id.* When approached by the SFPD “arrest team,” Doe-6 had
 24 “numerous individually wrapped off white rocks” of crack in his mouth which he then spit to the
 25 ground. *Id.* In total, Doe-6 spat forty-one individually wrapped rocks of crack cocaine from his
 26 mouth. *Id.* at Ex.00229-00230. Officers also found a baggie of marijuana and \$29 in Doe-6’s
 27

1 front pant pocket. *Id.* at Ex.00229.

2 SFPD booked Doe-6 at Tenderloin Station where a records check revealed that he was on
3 felony probation and also had a no bail felony warrant for his arrest. *Id.*

4 G. Jane Doe-7

5 On October 15, 2013, SFPD conducted a surveillance operation in the Tenderloin near
6 Turk and Taylor Streets. Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00051. There, an
7 officer saw [REDACTED] ("Jane Doe-7"), "a Hawaiian female" who he knew "from numerous
8 prior contacts." *Id.* at Ex.00054. The officer watched as Doe-7 made a suspected drug
9 transaction near 144 Taylor Street. *Id.* at Ex.00054-00055. Officers then arrested the buyer, who
10 dropped a rock of crack cocaine to the sidewalk when they approached. *Id.* at Ex.00054. When
11 Doe-7 was subsequently arrested, officers found her \$371 "crumpled in her purse." *Id.* at
12 Ex.00055. Doe-7 was booked at Tenderloin station. *Id.* The officers who arrested Doe-7 noted
13 that the location at which she sold crack "was within 1000 yards" of "the San Francisco City
14 Academy," a school located at 230 Jones Street. *Id.* One officer measured the distance between
15 the school and the site of Doe-7's drug transaction: "approximately 737 feet." *Id.*

16 At the time of her October 2013 arrest, Doe-7 was on felony probation for a prior
17 conviction under H&S Code section 11352(a), and she was known to "frequent[] the Tenderloin
18 District." *Id.* at Ex.00055. The conviction for which Doe-7 was on probation (court number
19 12017792) was based on an arrest made in the Tenderloin, too (at 132 Eddy Street). Ex. 1,
20 Koeninger Disco. Mtn. Decl., Att. F at Ex.02199. Additionally, Doe-7 had at least two other
21 prior drug-trafficking arrests in the Tenderloin: first, a December 2010 arrest at 64 Turk Street
22 which lead to a charge under H&S Code section 11352(a); second, a May 2012 arrest at 29
23 Mason Street which lead to a charge under H&S Code section 11351.5. *See id.*


24 H. John Doe-8

25 [REDACTED]
26 [REDACTED] ("John Doe-8") was arrested on December 26, 2013 for narcotics
27

1 trafficking near 353 Turk Street. Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00249.
 2 According to the relevant incident report, Doe-8 is White (“W”). *Id.* at Ex.00244. When he was
 3 subsequently charged in Superior Court for various drug-trafficking violations, it represented at
 4 least the fifth time that drug-trafficking charges were filed against Doe-8 in San Francisco. *See*
 5 Ex. 1, Koeninger Disco. Mtn. Decl., Att. F at Ex.02181 (detailing cases in March 2013, July
 6 2011, February 2011, and June 2008). In at least two of his previous cases, Doe-8 was arrested
 7 in the Tenderloin. *See id.*

8 Doe-8’s December 2013 arrest occurred after SFPD officers observed him engage in a
 9 suspected narcotics transaction with another White male. Ex. 1, Koeninger Disco. Mtn. Decl.,
 10 Att. A at Ex.00249. When the officers approached Doe-8 to investigate, they saw money and
 11 two pieces of heroin in his open hand. *Id.* After detaining Doe-8, officers ran a records check
 12 and learned that he was “on active felony probation with a search condition.” *Id.* During a
 13 search of Doe-8’s person, the officers found: 110 pills of oxycodone; twenty-two pills of
 14 buprenorphine/naloxone; twenty-nine pills of clonazepam; one alprazolam pill; five morphine
 15 pills; and \$117. *Id.* at Ex.00247-00249.

16 I. John Doe-9

17 In early September 2013, the SFPD received information that 
 18 (“John Doe-9”) was selling methamphetamine from his apartment on O’Farrell Street in the
 19 Tenderloin (near the intersection of Jones Street). Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at
 20 Ex.00077. Using a telephone number provided by an informant, an undercover officer contacted
 21 Doe-9 on September 9 seeking to buy methamphetamine. *Id.* Doe-9 said he “was out of Ice but
 22 had ‘Molly,’” which “is a mixture of methamphetamine and ecstasy.” *Id.* The officer later met
 23 Doe-9 in a laundromat at 517 O’Farrell Street where he purchased “four quarters” of Molly from
 24 Doe-9 (1.8 grams gross). *Id.* According to the SFPD incident report, Doe-9 is a White (“W”)
 25 male. *Id.* at 00075.

26 Eleven days later, the same officer contacted Doe-9 and asked to buy “Ice” or “Molly.”

27
 28 NOTICE OF MOTION AND MOTION TO COMPEL DISCOVERY ON SELECTIVE PROSECUTION AND
 ENFORCEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION
 CASE NO. CR 14-643 EMC

Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00019. Prior to the call, the officer had already obtained a search warrant to search Doe-9's apartment. *Id.* Doe-9 said he only had ecstasy and marijuana, but would try to locate some methamphetamine. *Id.* When he next spoke with the officer, Doe-9 explained that he could not find any methamphetamine, but he agreed to sell another "quarter of 'Molly'" to the officer at the same laundromat. *Id.* Doe-9 was arrested after he arrived at the laundromat and sold the officer ecstasy. *Id.* During execution of the search warrant at Doe-9's apartment, SFPD recovered nineteen baggies of marijuana and a digital scale. *Id.* at Ex.00019-00020.

Doe-9 was booked at Northern Station where officers learned that he "had two outstanding warrants." Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00020. Doe-9 was subsequently charged in Superior Court with violating H&S Code section 11359. Ex. 1, Koeninger Disco. Mtn. Decl., Att. F at Ex.02201. According to the CMS data obtained by the FPD, Doe-9 was previously charged with drug-trafficking crimes in (at least) January 2010, August 2009, and November 2008. *See id.*

J. John Doe-10

During 2013, the SFPD arrested [REDACTED] (John Doe-10) at least three times for trafficking crack cocaine in the Tenderloin – including an arrest for selling within 1,000 feet of a school on November 18, 2013. On that occasion, officers were engaged in a "spotting operation" near the corner of Hyde Street and Golden Gate Avenue. Ex. 1, Koeninger Disco. Mtn. Decl., Att. C at Ex.00676. There, an officer saw Doe-10,³³ "a subject that [he had] made contact with in the past." *Id.* at Ex.00676. The officer watched as Doe-10 engaged in a narcotics transaction with a woman by spitting a "white object" from his mouth, showing it to the woman, and exchanging it for cash. *See id.* The woman was later arrested with one crack rock in her possession. *See id.* Officers then arrested Doe-10 and found \$582 on his person. *Id.*

³³ The relevant incident report identifies Doe-10 as Hispanic ("H"). *Id.* at Ex.00674.

1 The officers also noted that the observed drug transaction took place within 1,000 feet of the
 2 “DeMarillac Academy located at 175 Golden Gate Ave.” *Id.* While Doe-10 was being booked
 3 at Tenderloin Station, the officers learned that he had “an open case” and a stay-away order from
 4 the area in which they arrested him. *Id.* The open case was based on Doe-10’s arrest on August
 5 22, 2013. *Cf. id.* (listing court case number for “open case”) with Ex. 1, Koeninger Disco. Mtn.
 6 Decl., Att. F at Ex.02186 (listing same court case number, “8/22/2013” arrest date, and SFPD
 7 incident number). Based on his November 2013 arrest, Doe-10 was charged in Superior Court
 8 with selling and offering to sell crack cocaine in violation of H&S Code section 11352(a). Ex. 2,
 9 Ultan Disco. Mtn. Decl., Att. B at Ex.02465. Moreover, the complaint alleged that Doe-10
 10 committed the his offense within 1,000 feet of a “public or private elementary, vocational, junior
 11 high, or high school, to wit: DEMARILLAC ACADEMY.” *Id.* at Ex.02466.

12 As noted above, Doe-10’s August 22, 2013 arrest also led to Superior Court charges, and
 13 it likewise was the result of crack cocaine sales in the Tenderloin (in particular, the corner of
 14 Eddy and Hyde Streets). Ex. 1 Koeninger Disco. Mtn. Decl., Att. A at Ex.00528-00531.
 15 Specifically, Doe-10 sold two crack rocks directly to an undercover officer. *Id.* at Ex.00531.
 16 When SFPD arrested Doe-10, officers recovered four more crack rocks from his mouth and \$93
 17 from his person. *Id.* Following this August 2013 arrest, Doe-10 was charged in a three-count
 18 felony complaint with violating H&S Code section 11351.5 and 11352. Two counts in the
 19 complaint were based on the events described above, but one count was predicated on yet
 20 another arrest that occurred eight months earlier on January 29, 2013. Ex. 2, Ultan Disco. Mtn.
 21 Decl., Att. B at Ex.02512-13.

22 Doe-10’s January 2013 arrest also occurred at the corner of Eddy and Hyde Streets,
 23 where officers saw him speaking with two other individuals. Ex. 1, Koeninger Disco. Mtn.
 24 Decl., Att. D at Ex.00728. After Doe-10 “spit numerous objects into his hand,” officers
 25 suspected that they “were witnessing a narcotics transaction.” *Id.* They detained Doe-10 and the
 26 two other persons, one of whom admitted to buying six crack rocks from Doe-10. *Id.* Doe-10
 27

1 had \$316 in his possession. *Id.* The officers transported Doe-10 to Tenderloin Station and
2 booked him under H&S Code section 11352(a).

3 Finally, Doe-10 was most recently arrested on April 29, 2015 for trafficking crack
4 cocaine at 255 Hyde Street in the Tenderloin. Doe-10 was again charged in Superior Court with,
5 *inter alia*, possession of crack cocaine for sale in violation of H&S Code section 11351.5. Ex. 2,
6 Ultan Discovery Decl., Att. B at Ex.02424. He also was charged with loitering while carrying a
7 concealed weapon (a knife) in violation of Penal Code section 1291(b). *Id.*

8 K. John Doe-11

9 On October 23, 2013, three plainclothes SFPD officers were driving southbound on Hyde
10 Street near its intersection with Eddy Street. Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at
11 Ex.00506. From their patrol car, one of the officers saw “a Latin male” who he recognized as
12 [REDACTED] (“John Doe-11”). *Id.* According to the officer, Doe-11 “frequents the 200 block of
13 Hyde Street” and was “known to numerous Tenderloin Officers [sic].” *Id.* The officer reported
14 that he saw Doe-11 “on Hyde Street almost every day that I work.” *Id.* The officer also knew
15 that Doe-11 had been arrested at 255 Hyde Street less than three weeks earlier for resisting
16 arrest, and was arrested on July 16, 2013 for selling crack cocaine to an undercover officer at 232
17 Hyde Street. *Id.* Doe-11 also was arrested on June 2, 2011 for trafficking crack cocaine near
18 496 Eddy Street. *See* Ex. 1, Koeninger Disco. Mtn. Decl., Att. F at Ex.02152.

19 From his patrol car, the officer watched as Doe-11 engaged in a “a hand-to-hand
20 narcotics transaction” with a Black male. Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at
21 Ex.00506. The officers stopped their car, and Doe-11 fled when he saw them. *Id.* The buyer
22 dropped three individually wrapped crack rocks to the sidewalk as the officers approached and
23 was subsequently arrested. *Id.* The officers eventually caught up to Doe-11, who was arrested.
24 Doe-11 was booked at Tenderloin Station and eventually charged in Superior Court with
25 violating H&S Code section 11352(a). *See* Ex. 1, Koeninger Disco. Mtn. Decl., Att. F at
26 Ex.02152.

1 Doe-11 was previously charged with drug-trafficking violations in June 2011 based on an
2 arrest at 496 Eddy Street. *Id.*

3 L. John Doe-12

4 On November 26, 2014, SFPD Officers responded to Hyde and Fulton Streets “on a call
5 of a group of Hispanic males selling drugs.” Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at
6 Ex.00148. Officers encountered [REDACTED] (“John Doe-12”), and while detaining him,
7 Doe-12 spat out “twenty four plastic twists” containing crack cocaine. Doe-12 was booked for
8 violating H&S Code section 11351.5 and identified at the station by his fingerprint. *Id.* The
9 SFPD incident report identifies Doe-12’s race as Hispanic (“H”).

10 According to the Superior Court file, Doe-12’s November 2014 arrest resulted in felony
11 complaint alleging a violation of section 11351.5. Ex. 2, Ultan Discovery Decl., Att. B at
12 Ex.02811. Doe-12 apparently was also arrested on July 12, 2014 for trafficking crack cocaine,
13 because the felony complaint separately alleges a section 11352(a) violation on that date. *Id.*

14 San Francisco Superior Court records also show that Doe-12 was convicted in February
15 2009 for violating H&S Code section 11351.5. Ex. 2, Ultan Disco. Mtn. Decl., Att. B at
16 Ex.02772. As a result of that conviction, Doe-12 was ordered to stay away from the intersection
17 of Eddy and Hyde streets. *Id.* at Ex.02773.

18 Finally, Doe-12 was again arrested for drug-trafficking in the Tenderloin (Hyde and
19 Fulton) on January 29, 2015. *See* Ex. 1, Koeninger Disco. Mtn. Decl., Att. F at Ex.02175
20 (indicating section 11352(a) charge).

21 M. John Doe-13

22 On both October 23, 2014 and November 12, 2014, SFPD officers arrested [REDACTED]
23 [REDACTED] (“John Doe-13”)³⁴ for selling crack cocaine near the intersection of Hyde Street and
24 [REDACTED]

25
26 ³⁴ The S.F. Superior Court documents spell [REDACTED] name both as [REDACTED] and [REDACTED].

1 Golden Gate Avenue. During the October 23 incident, officers were engaged in a “spotting
 2 operation” when they “observed a Hispanic male” (Doe-13) engage in a hand-to-hand drug
 3 transaction with another person. Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00137. When
 4 Doe-13 was subsequently arrested, officers recovered forty-four individually wrapped crack
 5 rocks from Doe-13’s mouth. *Id.* Doe-13 was charged in Superior Court with violating H&S
 6 Code sections 11351.5 and 11352.

7 While the above case was pending, Doe-13 again was arrested by SFPD for trafficking
 8 crack cocaine at the corner of Hyde Street and Golden Gate Avenue. Ex. 1, Koeninger Disco.
 9 Mtn. Decl., Att. A at Ex.00106. In particular, officers patrolling the area on November 12
 10 observed Doe-13 offering to sell crack cocaine to woman in front of the U.S. post office at 101
 11 Hyde Street. *Id.* When they detained Doe-13, the officers seized five plastic-wrapped bindles of
 12 crack from his hand. *Id.* Doe-13 was again charged in Superior Court with violating H&S Code
 13 section 11351.5. Ex. 2, Ultan Disco. Mtn. Decl., Att. B at Ex.02269-02270; Ex. 1, Koeninger
 14 Disco. Mtn. Dec., Att. F at Ex.02165. He also was charged with violating a stay-away order
 15 imposed after his October arrest. Ex. 2, Ultan Disco. Mtn. Decl., Att. B at Ex.02269-02270.

16 N. John Doe-14

17 Between August 2014 and November 2014, SFPD officers arrested [REDACTED]
 18 (“John Doe-14”) at least three times – all for narcotics trafficking near the corner of Larkin and
 19 O’Farrell Streets. *See* Ex. 1, Koeninger Disco. Mtn. Decl., Att. F at Ex.02160. Doe-14 had two
 20 additional drug-trafficking arrests at the same corner in March and April 2015. *See id.* All five
 21 arrests led to charges in Superior Court. *Id.*

22 Defense counsel has not yet obtained the incident reports underlying Doe-14’s November
 23 2014, March 2015 and April 2015 drug-trafficking arrests. On October 2, 2014, however, Doe-
 24 14 was arrested during a narcotics “spotting operation.” Ex. 1, Koeninger Disco. Mtn. Decl.,
 25 Att. A at Ex.00326. Officers saw “a Hispanic male” (Doe-14) engage in a hand-to-hand
 26 narcotics transaction with a “Black male”; when officers detained the buyer (the “Black male”),
 27

1 they found a rock of crack cocaine in his possession. *Id.* Doe-14 was later arrested with \$92 and
2 booked at Tenderloin station under H&S section 11352(a). *Id.* at Ex.00323

3 Two months earlier, SFPD had arrested Doe-14 at the same corner when an undercover
4 officer purchased a rock of crack cocaine directly from Doe-14. Ex. 1, Koeninger Disco. Mtn.
5 Decl., Att. A at Ex.00290. Officers found \$351 in his possession and booked him Tenderloin
6 Station under H&S Code section 11352(a). *Id.* at Ex.00289.

7 O. John Doe-15

8 The SFPD began investigating [REDACTED] ("John Doe-15") in October 2013 after an
9 informant told officers that Doe-15 was "selling large amounts of methamphetamine throughout
10 the City and is living at the Winton Hotel at 445 O'Farrell." Ex. 1, Koeninger Disco. Mtn. Decl.,
11 Att. A at Ex.00048.³⁵ SFPD officers knew Doe-15 "from prior narcotics investigations as a
12 known methamphetamine trafficker" and also knew that he was "currently on felony probation
13 with a warrantless search condition." *Id.* at Ex.00048.

14 On October 18, 2013, officers followed Doe-15 to the fourth floor of the Winton Hotel
15 and detained him in the hallway outside his room. *Id.* Officers found \$2,146 on Doe-15's
16 person. *Id.* at Ex.00045-00048. During a search of Doe-15's room, the officer encountered Doe-
17 15's roommate, who said that Doe-15 had lived there with him for about a year, "except for the
18 time that [Doe-15] was incarcerated earlier [that] year." *Id.* at Ex.00048. During a probation
19 search of Doe-15's "area of the apartment," officers found 12.6 grams (gross) of
20 methamphetamine on a shelf along with a digital scale and sandwich baggies. *Id.* at Ex.00048-
21 00049. Inside a safe in the same area, officers found fourteen "individually packaged large
22 amounts" of methamphetamine – weighing 405.5 grams (gross) – and an additional \$2,800. *Id.*
23 at Ex.00045-00048.

24 Based on the October 2013 arrest, Rivas was charged in S.F. Superior Court with

25
26 ³⁵ The relevant SFPD incident report identifies Doe-15 as White ("W"). *Id.* at Ex.00044.

1 violating H&S Code section 11378. Ex. 1, Koeninger Disco. Mtn. Decl., Att. F at Ex.02187.
2 Rivas had previously been arrested on at least three other occasions for violating section 11378
3 (November 2009, March 2009, and April 2007), each of which resulted in state charges. *Id.*

4 P. John Doe-16

5 In October 2014, SFPD received [REDACTED] ("John Doe-16")'s phone number from an
6 informant in relation to a narcotics-trafficking investigation. Ex. 1, Koeninger Disco. Mtn.
7 Decl., Att. A at Ex.00342. SFPD described Doe-16³⁶ as "a notorious methamphetamine
8 trafficker" who is "currently on felony probation with a warrantless search condition out [of] San
9 Mateo County for [a] narcotics offense" (a violation of H&S Code section 11378). *Id.* at
10 Ex.00380. On December 3, 2014, an undercover officer telephoned Doe-16 and arranged to buy
11 an "8Ball" of methamphetamine from him; Doe-16 said he was currently in the area of Turk and
12 Taylor Streets and would meet the officer in the area of Jones Street and Golden Gate Avenue.
13 *Id.* at Ex.00342. Doe-16 and the officers rendezvoused at 55 Golden Gate, and Doe-16 sold the
14 officer 4 grams (gross) of methamphetamine. *Id.* The officer then drove away. *Id.*

15 About four weeks later, on December 30, the officer again called Doe-16 and arranged to
16 buy "two 8balls" of methamphetamine near 50 Golden Gate Avenue. Ex. 1, Koeninger Disco.
17 Mtn. Decl., Att. A at Ex.00380. Doe-16 arrived with the methamphetamine and was arrested.
18 *Id.* Upon searching Doe-16 and the contents of his car, officers found (in addition to the meth)
19 marijuana and a meth pipe. *Id.* Doe-16 was taken to Tenderloin Station while some officers
20 traveled to his Oakland residence to conduct a probation search. *Id.* at Ex.00381. There, they
21 found marijuana, liquid GHB, a digital scale, numerous ziplock baggies and envelopes. *Id.*

22 Doe-16 was subsequently charged in Superior Court based on the foregoing events. *See*
23 Ex. 1, Koeninger Disco. Mtn. Decl., Att. F at Ex.02207. This was not the first time Doe-16
24 faced drug-trafficking charges in San Francisco. In January 2010, Doe-16 was also charged with
25

26 ³⁶ The incident report identifies Doe-16 as White ("W"). Ex.00341.

1 violating H&S Code sections 11359, 11366, 11377, 11378, and 11379. *See id.*

2 Q. John Doe-17

3 As they conducted a narcotics surveillance operation at Larkin and O'Farrell Streets on
4 September 1, 2014, SFPD officers saw [REDACTED] [REDACTED] ("John Doe-17") standing on the corner.
5 Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00450. Doe-17, identified as Hispanic ("H"),
6 *id.*, was well-known to the officers. One officer "recognized [Doe-17] from a prior base cocaine
7 sale arrest that occurred in the [same] area." *Id.* A surveilling officer saw "[Doe-17] sell base
8 cocaine." *Id.* Another officer involved in the operation added:

9 [Doe-17] was also arrested during another surveillance operation in this area on
10 09-05-2013 for selling base cocaine In addition to his two prior arrests in
11 this area, myself, and the other plain clothes officers I work with, observe [Doe-
12 17] loitering in the area of O'[F]arrell Street and Larkin Street on a daily basis. I
13 observe [Doe-17] in this area when I am on patrol and when I conduct
14 surveillance in the area of Larkin and O'[F]arrell Street. On many occasions,
15 [Doe-17] appears to take the role of a supervisor in this area, directing 'buyers' to
16 other 'sellers.' I have observed [Doe-17] conduct suspected hand to hand
17 narcotics transactions in this area.

18 Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00450.

19 SFPD officers watched Doe-17 for about an hour on September 1, during which time he
20 engaged in a drug transaction. *Id.* Officers arrested the buyer at another location and found him
21 in possession of a glass pipe with "rocks/crumbs" of crack cocaine "stuffed in one end." *Id.*
22 Officers arrested Doe-17 and booked him at Tenderloin Station. *Id.* at Ex.00450-00451.

23 R. John Doe-18

24 On June 11, 2014, SFPD officers were conducting a "buy bust" operation in the
25 Tenderloin. Ex. 41, Amram Disco. Mtn. Decl., Att. O at Ex.04248-54. While walking on Hyde
26 Street near Fulton, an officer "observed (3) Latino males engaging in numerous hand to hand
27 narcotic sales of suspected cocaine base." *Id.* [REDACTED] [REDACTED] ("John Doe-18") was one of
28 the three "Latino males" and appeared to be "managing the drug sales between the three of

1 them.” *Id.* After an undercover officer purchased drugs from one of the “Latino males,” all
 2 three were arrested. During his arrest, Doe-18 spit 16 rocks of crack cocaine from his mouth. *Id.*
 3 Doe-18 was booked under Cal. H&S Code sections 11351.5 and/or 11352. *Id.*

4 In addition to the June 11 arrest, the SFPD arrested Doe-18 on at least two other
 5 occasions in 2014 for drug-trafficking in the Tenderloin. *See* Ex. 1, Koeninger Disco. Mtn.
 6 Decl., Att. F at Ex.02203. First, Doe-18 was arrested near Hyde Street and Golden Gate Avenue
 7 on March 11, 2014 for violating H&S Code section 11352(a). *Id.* He also was arrested April 3,
 8 2014 at 330 Golden Gate Avenue for violating H&S Code section 11351.5. *Id.*

9 S. John Doe-19

10 While conducting a “Buy Bust” operation on September 9, 2013, an undercover SFPD
 11 officer working at the corner of Hyde Street and Golden Gate Avenue purchased three rocks of
 12 crack cocaine from “a Latin male” named [REDACTED] (“John Doe-
 13 19”). Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00571-73. According to SFPD, Doe-19
 14 “has had numerous prior narcotics related arrests,” and he also “had an 11352(a) H&S
 15 conviction” from April 2009 in San Francisco Superior Court. *Id.* at Ex.00574. In that case,
 16 Doe-19 was charged under the name [REDACTED]. Ex. 1, Koeninger Disco. Mtn. Decl., Att. F at
 17 Ex.02200 (listing same case number with March 2009 arrest date). In addition to the April 2009
 18 conviction, [REDACTED] was charged in December 2009 with one count of violating H&S Code
 19 section 11352(a) based on an arrest at 537 Hyde Street in San Francisco. *Id.*

20 T. John Doe-20

21 On October 31, 2013, SFPD “organized a ‘Buy Bust’ operation in the Tenderloin
 22 District.” Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00519. “[S]everal children in
 23 Halloween costumes ... appeared to be ‘trick or treating’” nearby while officers in plainclothes
 24 surveilled the corner of Hyde Street and Golden Gate Avenue. *Id.* at Ex.00520. Near that
 25 corner, officers saw “a Latin male,” [REDACTED] (“John Doe-20”). *Id.* at Ex.00519. At least
 26
 27

1 one of the officers “recognized [Doe-20] from a prior surveillance operation” during which the
2 officer “observed [Doe-20] engage in several suspected hand to hand narcotics deals in this same
3 area.” *Id.* at Ex.00520.

4 An undercover officer approached Doe-20 and purchased one rock of crack cocaine from
5 him. Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00520. Afterwards, other officers
6 arrested Doe-20 and seized \$112 from his person. *Id.* at Ex.00519-00520. Later, the officers
7 measured the distance between the location where Doe-20 sold the crack rock and “175 Golden
8 Gate Avenue, the DeMarillac Academy” (a nearby school). *Id.* at Ex.00519. Because the
9 distance was “approximately 715.1 feet,” Doe-20 was “in violation of 11353.6(b) H&S” as well
10 as H&S Code section 11352(a). *Id.* at Ex.00517-00519. Doe-20 was later charged in S.F.
11 Superior Court under both statutes. Ex. 1, Koeninger Disco. Mtn. Decl., Att. F at Ex.02134.

12 U. John Doe-21

13 While conducting a “Buy Bust Operation” in the Tenderloin on October 22, 2013, an
14 SFPD officer purchased one rock of crack cocaine from “a Hispanic male” at the corner of
15 Larkin and O’Farrell Streets. Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00500. They
16 then arrested the seller, [REDACTED] (“John Doe-21”), and found \$401 on his person.
17 *Id.* The officers also noted that the place at which the narcotics transaction took place was “971
18 feet in distance” from the “Tenderloin Recreation Center” located at 570 Ellis Street. *Id.*
19 Accordingly, Doe-21 was booked at Tenderloin station for violating H&S Code sections
20 11352(a) and 11353.6(b). *Id.* at Ex.00498.

21 V. John Doe-22

22 On September 16, 2014, SFPD officers arrested [REDACTED] (“John Doe-22”), a
23 “Hispanic male,” at the corner of Hyde Street and Golden Gate Avenue after he sold crack
24 cocaine to an undercover officer. Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00310.
25 According to the incident report:
26

27
28 NOTICE OF MOTION AND MOTION TO COMPEL DISCOVERY ON SELECTIVE PROSECUTION AND
ENFORCEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION
CASE NO. CR 14-643 EMC

1 The DeMarillac Academy is a half a block away from where all these narcotics
2 transactions are taking place [at Hyde and Golden Gate]. The Academy is a
3 school for students ranging from Kindergarten to 8th grade. The narcotics dealers
4 in this area have the audacity to continue their open air narcotics deals while
5 students are being walked to and from school.

6 *Id.* The location at which Doe-22 sold crack to the undercover officer was “720 feet” from the
7 “front gate of DeMarillac Academy.” *Id.* Doe-22 was booked at Tenderloin Station under H&S
8 Code section 11352(a), and a “charge of selling narcotics within 1000 feet of a school.” *Id.*

9 Doe-22’s September 2014 was not his first drug-trafficking charge from the Tenderloin.
10 *See* Ex. 1, Koeninger Disco. Mtn. Decl., Att. F at Ex.02144. He also was charged in February
11 2010 for drug sales, and that case arose from an arrest in the Tenderloin at Geary and Hyde
12 Streets. *Id.*

13 W. John Doe-23

14 On November 2, 2014, SFPD officers were conducting a “spotting operation” in the
15 Tenderloin at Larkin and O’Farrell Streets, an area “well known to officers due to the abundant
16 levels of narcotics activity that take place” there. Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at
17 Ex.00163. Officers “observed a Latin male later identified as [REDACTED] (“John Doe-23”). *Id.*
18 One officer “immediately recognized [Doe-23] as a subject that we have arrested in the past for
19 narcotics sales” and “noted that [Doe-23] currently ha[d] an open case pending as well as a stay
20 away order from the area of Larkin and O’Farrell St.” *Id.* After observing Doe-23 engage in
21 what they believed was a “street level hand to hand narcotics transaction,” the officer detained
22 the buyer and recovered one rock of crack cocaine from his person. *Id.* The officers then
23 arrested Doe-23, on whose person they found \$278. *Id.*

24 The “open pending case” and “stay away order” referenced above was based on Doe-23’s
25 February 11, 2014 arrest by the same SFPD officers at the same location (Larkin and O’Farrell).
26 Ex. 1, Koeninger Disco. Mtn. Decl., Att. D at Ex.00704-09. On that occasion, the officers saw
27 Doe-23 engage in a hand-to-hand drug transaction; when they arrested him moments later, the
28

1 officers seized eleven individually wrapped rocks of crack cocaine from Doe-23's left hand. *Id.*
2 at Ex.00709. Doe-23 was later charged in Superior Court with violating H&S Code sections
3 11351.5 and 11352(a). Ex. 1, Koeninger Disco. Mtn. Decl., Att. F at Ex.02135.

4 X. John Doe-24

5 On November 4, 2014, while conducting a "Buy Bust" operation "at the intersection of
6 Hyde Street and Golden Gate Avenue," an SFPD officer using binoculars "observed a Latin male
7 who [he] recognized from a prior arrest." Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at
8 Ex.00183. The "Latin male" was [REDACTED] ("John Doe-24"). The officer noted that Doe-
9 24 had "an open matter" in Superior Court for another drug-trafficking arrest in "the area of
10 Hyde Street and Golden Gate Avenue." *Id.*

11 The officer saw Doe-24 standing near the entrance to the U.S. post office, where he was
12 approached by a man who gave Doe-24 money in exchange for crack cocaine (a "small off-white
13 object" that Doe-24 spat from his mouth). *Id.* The buyer was arrested and officers seized a crack
14 rock and glass pipe from his person. *Id.* at Ex.00183-00184. Doe-24 was later charged in
15 Superior Court for violating H&S Code section 11352(a). *See* Ex. 1, Koeninger Disco. Mtn.
16 Decl., Att. F at Ex.02145. It was the third time Doe-24 faced drug-trafficking charges in 2014
17 alone. *See id.* (identifying October 2014 and February 2014 cases charging section 11352(a)
18 violations).

19 Y. John Doe-25

20 SFPD officers arrested [REDACTED] "John Doe-25") on September 13, 2013 while
21 conducting a narcotics surveillance operation at the area of Hyde and Eddy Streets. While
22 watching the 200 block of Hyde, one officer saw Doe-25, who he knew "from prior contacts."
23 Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00580. Doe-25 was approached by a female
24 who gave him money in exchange for an object that Doe-25 retrieved from his mouth. *Id.*
25 Believing that Doe-25 had just engaged in "a street level hand to hand narcotics transaction," the
26

1 officers arrested the buyer and recovered two individually wrapped crack rocks and a glass pipe.
 2 *Id.* Doe-25 was arrested, too, and the officers found “numerous amounts” of “rolled and
 3 crumpled” currency in his possession totaling \$228. *Id.*

4 Doe-25 was booked at Tenderloin Station where a records check “revealed that he [was]
 5 currently on felony probation with a warrantless search condition for 11352(a).” *Id.* According
 6 to CMS, Doe-25 also was charged with drug-trafficking crimes in August and September 2011.
 7 Ex. 1, Koeninger Disco. Mtn. Decl., Att. F at Ex.02156.

8 Z. John Doe-26

9 During a three-week period in 2013, SFPD officers twice arrested [REDACTED] (“John
 10 Doe-26”) for selling crack cocaine along Hyde Street in the Tenderloin. Ex. 1, Koeninger Disco.
 11 Mtn. Decl., Att. A at Ex.00558-00564; Ex.00565-00569. The first arrest occurred on August 11,
 12 2013, after officers observed “a Hispanic male” (Doe-26) spit crack cocaine from his mouth and
 13 sell it to another man at the corner of Eddy and Hyde Streets. *Id.* at 00561. The officers arrested
 14 the buyer and found three crack rocks and a glass pipe on his person. *Id.* The buyer said that he
 15 bought the crack from Doe-26. *See Id.* When the officers arrested Doe-26 and searched his
 16 person, they found “two wads of currency” totaling \$683. Doe-26 was booked at Tenderloin
 17 Station and later charged with violating H&S Code section 11352. *Id.* at Ex.00561-00564; Ex. 1,
 18 Koeninger Disco. Mtn. Decl., Att. F at Ex.02142.

19 The SFPD again arrested Doe-26 for selling crack on September 4, 2013. Ex. 1,
 20 Koeninger Disco. Mtn. Decl., Att. A at Ex.00565-00569. On that date, an undercover officer
 21 purchased two crack rocks from “a Hispanic male” (Doe-26) at 245 Hyde Street. *Id.* Ex.00568.
 22 Doe-26 was arrested with \$206 in his possession (including \$40 in police-marked funds) and
 23 booked. *Id.* Ex.00569. Doe-26 was again charged with violating H&S Code section 11352. Ex.
 24 1, Koeninger Disco. Mtn. Decl., Att. F at Ex.02142. Approximately two months later, while
 25 trying to locate Doe-26, SFPD officers found him “in custody with the Alameda County
 26 Sheriff’s Department (ACSD) on an unrelated matter.” Ex. 1, Koeninger Disco. Mtn. Decl., Att.
 27

1 A at Ex.00564.

2 AA. John Doe-27

3
4 During the autumn of 2013, the SFPD twice arrested [REDACTED] ("John Doe-27") for
5 selling crack cocaine in the Tenderloin. First, on October 25, Doe-27 was observed in near
6 Larkin and O'Farrell Streets attempting to avoid detection by the officers, manipulating objects
7 in his mouth, and eventually fleeing. Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00510.
8 Believing that Doe-27 was attempting to destroy contraband, the officers detained him, and Doe-
9 27 subsequently spit fourteen crack rocks from his mouth. *Id.* Doe-27 was booked under H&S
10 Code sections 11351.5 and 11352. *Id.* The police incident report identifies him as Hispanic
11 ("H").

12 On November 13, 2013 (approximately two weeks later), SFPD officers again arrested
13 Doe-27 for trafficking crack cocaine, this time near the corner of Hyde and Turk Streets. Ex. 1,
14 Koeninger Disco. Mtn. Decl., Att. A at Ex.00205. On that occasion, Doe-27 sold one crack rock
15 to an undercover officer, and additional rocks were recovered after Doe-27 was arrested. *Id.*
16 Following this second arrest, Doe-27 was charged in Superior Court with two counts of violating
17 H&S Code section 11351.5 (presumably based on his October and November arrests) and one
18 count of violating H&S Code section 11352. Ex. 1, Koeninger Disco. Mtn. Decl., Att. F at
19 Ex.02204.

20 BB. John Doe-28

21 At the same time that SFPD officers arrested Doe-27 for selling crack cocaine on
22 November 13, 2013, *see supra*, they also arrested "another Hispanic male" named [REDACTED]
23 ("John Doe-28"). Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00202. Doe-28 was standing
24 "right next to" Doe-27 at the corner of Turk and Hyde Streets when officers approached to arrest
25 Doe-27; Doe-28 then fled. *Id.* One of the officers grabbed Doe-28 by his sweatshirt, and Doe-
26 28 spit six rocks of crack cocaine onto the sidewalk. *Id.* Upon searching Doe-28, officers found
27

1 \$159 and no paraphernalia for ingesting crack. *Id.*

2 Doe-28 was transported to Tenderloin Station where officers learned that he had an
3 outstanding felony warrant based on his failure to appear in Superior Court for case number
4 13022119. *Id.* In that case, Doe-28 was charged with violating H&S Code section 11352(a)
5 based on an arrest that occurred just three months earlier at another location in the Tenderloin
6 (the corner of Polk and Olive Streets). *See* Ex. 1, Koeninger Disco. Mtn. Decl., Att. F at
7 Ex.02178.

8 Doe-28 was again arrested for drug trafficking in the Tenderloin (Larkin and O'Farrell
9 Streets) just a few months after his November 2013 arrest. *See id.* That arrest, on March 11,
10 2014, also led to charges under H&S Code section 11352(a). *Id.*

11 CC. John Doe-29

12 On September 10, 2014, SFPD officers arrested [REDACTED] ("John Doe-29") for the
13 third time in the past two months – all for drug-trafficking crimes, and all near Hyde Street in the
14 Tenderloin. Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00495; Ex. 1, Koeninger Disco.
15 Mtn. Decl., Att. F at Ex.02171. According to the reporting officer, he was surveilling the
16 intersection of Hyde and Fulton Streets for "narcotics dealings" when he "observed a Latin
17 male" (Doe-29) whom the officer recognized "as a suspected cocaine base dealer who we have
18 arrested on two prior occasions in the past two months." Ex. 1, Koeninger Disco. Mtn. Decl.,
19 Att. A at Ex.00495. After Doe-29 reportedly sold crack to a White male, both Doe-29 and the
20 buyer were arrested. *Id.* One crack rock was recovered from the buyer, and Doe-29 was found
21 in possession of \$149. *Id.* at Ex.00496. When Doe-29 was later booked at Tenderloin Station,
22 the officers confirmed that he had two open court cases in S.F. Superior Court, both for drug-
23 trafficking charges. *Id.* Doe-29's open cases were based on a July 28, 2014 arrest, and an arrest
24 five days earlier on July 23, 2014. *Id.*

25 Defense counsel has not yet obtained the incident report related to Doe-29's July 28
26 arrest, but the report detailing his July 23 arrest indicates that Doe-29 was arrested for selling
27

28 NOTICE OF MOTION AND MOTION TO COMPEL DISCOVERY ON SELECTIVE PROSECUTION AND
ENFORCEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION
CASE NO. CR 14-643 EMC

crack in the area of Hyde Street and Golden Gate Avenue. Ex. 1, Koeninger Disco. Mtn. Decl., Att. D at Ex.00763-00768. While searching Doe-29, the SFPD officers found one crack rock in Doe-29's pant pocket. Many of the same officers were involved in Doe-29's September 10 and July 23 arrests. *Compare id.*; Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00492-00493.

Ultimately, Doe-29 was charged in three separate cases in Superior Court, all of which alleged drug-trafficking crimes. *See* Ex.1, Koeninger Disco. Mtn. Decl., Att. F at Ex.02171. The latter two of Doe-29's cases also charged him under Cal. Penal Code section 12022.1(a), which prohibits the commission of a felony while released on bail. *Id.*

DD. John Doe-30

On December 2, 2014, SFPD officers arrested [REDACTED] ("John Doe-30") at the intersection of Larkin and O'Farrell Streets for selling crack cocaine to an undercover officer.³⁷ Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00413-00416. At the time of his arrest, Doe-30 was in possession of \$435. *Id.* at *Id.* at Ex.00761. This was not Doe-30's first arrest for trafficking crack cocaine. Doe-30 was also arrested by SFPD on January 15, 2013 near the corner of Larkin Street and Golden Gate Avenue. Ex. 1, Koeninger Disco. Mtn. Decl., Att. D at Ex.00761. During that incident, officers recovered twelve rocks of crack cocaine. *Id.*

Doe-30's December 2014 and January 2013 arrests both led to charges being filed in Superior Court. Ex. 1, Koeninger Disco. Mtn. Decl., Att. F at Ex.02143.

EE. John Doe-31


When SFPD officers arrested [REDACTED] ("John Doe-31") on July 3, 2014, it was third time he had been arrested for trafficking crack cocaine in the preceding six-month period. Ex. 1, Koeninger Disco. Mtn. Decl., Att. D at Ex.00678-00683; Ex.00684-00690; Ex.00691-00697. All three arrests took place near the corner of Larkin and O'Farrell Streets, an "area

³⁷ The SFPD incident report identifies Doe-30 as Hispanic ("H"). *Id.* at Ex.00413.

notorious for round the clock sales of narcotics.” *Id.* at Ex.00690. During the July 3 incident, one SFPD officer approached “a Hispanic male” (Doe-31) at 781 O’Farrell Street and purchased one crack rock from him. *Id.* at Ex.00694. SFPD recovered twenty-four more crack rocks from Doe-31’s mouth as he was being arrested. *See id.* During booking, officers “confirmed that [Doe-31] had two local felony narcotics warrants for his arrest,” that he had an active stay-away order for the intersection of Larkin and O’Farrell, and that he “ha[d] been arrested this year on two prior occasions for cocaine base sales in the area” of Larkin and O’Farrell Streets. *Id.* at Ex.00694-00695. As a result of the July 2014 arrest, Doe-31 was charged in Superior Court with violating H&S Code sections 11351.5 and 11352(a), as well as a contempt of court charge related to the stay-away order. Ex. 2, Ultan Disco. Mtn. Decl., Att. B at Ex.02321.

Doe-31’s two prior crack cocaine arrests occurred on April 16, 2014 and January 9, 2014. During the April incident, Doe-31 sold two crack rocks to an undercover officer and was found in possession of ten more upon his arrest. Ex. 1, Koeninger Disco. Mtn. Decl., Att. D, Ex.00681-00682. During the January incident, Doe-31 was observed selling one rock to an individual, and he was later arrested with fourteen individually wrapped crack rocks in his mouth. *Id.* at Ex.00681.

FF. John Doe-32

 (“John Doe-32”) was twice arrested by SFPD officers for selling crack cocaine in the Tenderloin during a two-week span in 2013. The first arrest occurred on September 27, 2013 near the corner of Hyde and Eddy Streets. Ex. 1, Koeninger Disco. Mtn. Decl., Att. A, Ex.00536-00540. Two officers became suspicious of a “group of five Hispanic men” (including Doe-32) who were standing at the corner of Hyde and Eddy, and their investigation ultimately resulted in Doe-32’s arrest. *Id.* at Ex.00536-00539. During that arrest, officers recovered eight individually wrapped baggies of crack cocaine from Doe-32’s front pant pocket. *Id.* at Ex.00539.

Next, on October 10, 2013, Doe-32 was arrested near the corner of Larkin and O’Farrell

1 Streets after officers observed him sell two rocks of crack cocaine to another person. Ex. 1,
 2 Koeninger Disco. Mtn. Decl., Att. D, Ex.00753-00757. The officers arrested both Doe-32 and
 3 the purchaser; they recovered \$176 from Doe-32 and two crack rocks from the purchaser. *Id.* at
 4 Ex.00752.

5 Doe-32 was ultimately charged in S.F. Superior Court with one count of violating H&S
 6 Code section 11351.5 (based on the September arrest) and one count of violating H&S Code
 7 section 11352(a) (based on the October arrest). Ex. 41, Amram Disco. Mtn. Decl., Att. O at
 8 Ex.04257-58.

9 GG. Jane Doe-33

10 After observing the driver of a parked vehicle engage in a suspected drug transaction with
 11 a passerby, SFPD officers approached the vehicle, parked at 205 Eddy Street, to investigate. Ex.
 12 1, Koeninger Disco. Mtn. Decl., Att. A, Ex.00624. The driver of the vehicle identified himself,
 13 and the officers learned he was on felony probation with an arrest warrant. *Id.* The officers
 14 ordered the driver from the car and arrested him; to conduct a search of the vehicle, the officers
 15 also ordered a female passenger, [REDACTED] ("Jane Doe-33"),³⁸ from the car. *Id.* at
 16 Ex.00624. As Doe-33 exited the vehicle, she grabbed a pouch from the car's front seat and
 17 "shoved it into her front waistband." *Id.* The officers directed her to remove the pouch and
 18 leave it in the vehicle. *Id.* Inside the pouch, officers found \$800. *Id.*

19 The officers also found a black purse in the vehicle; inside the purse, they found: 5.8
 20 grams (gross) of methamphetamine; 4.9 grams (gross) of crack cocaine; 5.3 grams (gross) of
 21 heroin; twenty-four clonazepam pills; twenty-five hydrocodone pills; thirty methadone pills; five
 22 oxycodone pills; two alprazolam pills; and one codeine pill. *Id.* at Ex.00619-25. Because the
 23 purse contained medicine bottles in Doe-33's name, the officers believed it belonged to her. *Id.*
 24 at Ex.00624. When Doe-33 was later booked at Tenderloin Station, officers found \$103 inside
 25

26 ³⁸ The SFPD incident report identifies Doe-33 as Asian ("A"). Ex.00617.

1 her bra.

2 Based on the foregoing, Doe-33 was charged in Superior Court with violating H&S Code
3 sections 11351, 11351.5, and 11378. Ex. 1, Koeninger Disco. Mtn. Decl., Att. F at Ex.02169.
4 Prior to this incident, Doe-33 had been arrested for drug-trafficking in the Tenderloin on at last
5 three other occasions, all of which resulted in state court charges. *See* Ex. 1, Koeninger Disco.
6 Mtn. Decl., Att. F at Ex.02169 (August 2008 arrest at 420 Eddy Street; November 2007 arrest at
7 6th and Stevenson Streets; July 2006 arrest at 433 Ellis Street).

8 HH. John Doe-34

9 On July 5, 2014, SFPD officers arrested [REDACTED] ("John Doe-34") for selling
10 crack cocaine near the corner of Larkin and O'Farrell Streets. Ex. 1, Koeninger Disco. Mtn.
11 Decl., Att. D, Ex.00701. Doe-34 had "36 individually wrapped off white rocks" of crack cocaine
12 in his possession. *Id.* Doe-34 was booked at Tenderloin Station, and the officers learned that he
13 "ha[d] an open case in San Francisco for 11352(a) HS and 11351.5 H&S." *Id.* The arrest
14 underlying that case happened February 26, 2014 – also at Larkin and O'Farrell Streets. *Id.*
15 Because of that open case, Doe-34 also had a stay-away order for the corner of Larkin and
16 O'Farrell streets. *Id.*; *see also* Ex. 1, Koeninger Disco. Mtn. Decl., Att. F at Ex.02150.

17 On September 13, 2014, Doe-34 was once again arrested near the corner of O'Farrell and
18 Larkin Streets for drug-trafficking. *See id.* That arrest, too, led to Superior Court charges under
19 H&S Code section 11352(a). *Id.*

20 II. John Doe-35

21 On September 2, 2014, [REDACTED] ("John Doe-35") was arrested by SFPD officers at
22 the corner of Hyde Street and Golden Gate Avenue. Ex. 1, Koeninger Disco. Mtn. Decl., Att. A,
23 Ex.00455. Moments earlier, the officers had seen Doe-35³⁹ sell crack cocaine to another
24

25
26 ³⁹ The SFPD incident report identifies Doe-35 as Hispanic ("H").

individual. Ex. 1, Koeninger Disco. Mtn. Decl., Att. A, Ex.00455. After detaining the buyer and recovering two individually wrapped crack rocks from his person, the officers arrested Doe-35. *Id.* During his arrest, Doe-35 spat fourteen individually wrapped rocks of crack cocaine from his mouth, and officers found \$181 on his person. *Id.* Doe-35 was charged with violating H&S Code sections 11351.5 and 11352. Ex. 2, Ultan Disco. Mtn. Decl., Att. B at Ex.02410-11.

One week later, on September 10, the SFPD arrested Doe-35 again for trafficking crack cocaine in the Tenderloin (933 Geary Street). Ex. 1, Koeninger Disco. Mtn. Decl., Att. F at Ex.02133. Doe-35 was again charged in Superior Court with violating H&S Code section 11351.5. Ex. 2, Ultan Disco. Mtn. Decl., Att. B at Ex.02415-16.

On January 14, 2015 (four months after the above-described arrests), Doe-35 was arrested at the corner of Fulton and Hyde Streets for trafficking crack cocaine. Ex. 2, Ultan Disco. Mtn. Decl., Att. B at Ex.02402-03. He was again charged in Superior Court with violating H&S Code sections 11351.5 and 11352. *Id.*

JJ. John Doe-36

When [REDACTED] (“John Doe-36”) was charged on March 3, 2014 with violating H&S Code section 11351.5, it was the third time that he had been charged in Superior Court for dealing crack cocaine near Larkin and O’Farrell Streets. Ex. 2, Ultan Disco. Mtn. Decl., Att. B at Ex.02655-56; Ex. 1, Koeninger Disco. Mtn. Decl., Att. F at Ex.02155.⁴⁰ Doe-36 was previously charged with trafficking crack at the same location in January 2013 and in August 2008. *See* Ex. 2, Ultan Disco. Mtn. Decl., Att. B at Ex.02686-87; Ex.02723; Ex. 1, Koeninger Disco. Mtn. Decl., Att. F at Ex.02155. When Doe-36 was charged in 2014 and 2013, both cases alleged his 2009 prior conviction under H&S Code section 11352 (the result of his 2008 case). Ex. 2, Ultan Disco. Mtn. Decl., Att. B at Ex.02686; Ex.02655.

⁴⁰ The CMS data indicates that Doe-36 is either White (“W”) or “Other” (“O”).

KK. John Doe-37

ers responded to 421 Ellis Street on August 7, 2014 and found [REDACTED] (“John Doe-37”). Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00277. As officers approached him, Doe-37⁴¹ threw an unidentified object to the ground. *Id.* at Ex.00277. The officers ordered him to “stop and get against the wall,” purportedly in order to issue him a citation for littering. *Id.* Upon inspecting the thrown object, the officers saw it was a bag containing multiple rocks of crack cocaine (4.9 grams gross). *Id.* Doe-37 was arrested and found with marijuana and \$512. *Id.* at. Ex.00275-77.

Doe-37 was taken to Tenderloin Station and booked for violating H&S Code section 11351.5. Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00277. A records check also revealed Doe-37 “was on Supervised Pretrial Release” from another case and “that he had an outstanding warrant.” *Id.* Prior to the foregoing arrest, Doe-37 had at least twice faced drug-trafficking charges in S.F. Superior Court: once in February 2006 and again in November 2009. *See* Ex. 1, Koeninger Disco. Mtn. Decl., Att. F at Ex.02168.

LL. John Doe-38

On October 15, 2013, SFPD officers patrolling the 700 block of O'Farrell Street (between Larkin and Hyde Streets) saw [REDACTED] [REDACTED] ("John Doe-38"),⁴² who they knew "from prior police contacts." Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00059. The officers also "knew that [Doe-38] is a methamphetamine dealer"⁴³ and was "on active CDC parole [] with a warrantless search and seizure condition." Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00059.

⁴¹ The SFPD incident report identifies Doe-37 as Hispanic (“H”). *Id.* at Ex.00275.

⁴² The SFPD incident report identifies Doe-38 as Hispanic (“H”). Ex.00059.

⁴³ According to the CMS system for San Francisco Superior Court, Doe-38 previously had been prosecuted under H&S Code section 11378 in July 2010 and June 2011. Ex. 1, Koeninger Disco. Mtn. Decl., Att. F at Ex.02157. He also was prosecuted under section 11378 in May 2014. *Id.*

As the officers approached Doe-38, he ran westbound on O'Farrell Street and dropped a cigarette box to the ground. Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00059. Doe-38 was detained and a search of the cigarette box yielded 19.6 grams (gross) of methamphetamine. *Id.* The officers also found \$465 on Doe-38's person and a California identification card belonging to the victim of a battery four months earlier. *Id.* Based on the quantity of the meth and the absence of any paraphernalia with which Doe-38 could ingest it, he was booked for violating H&S Code section 11378 and parole. *Id.*

MM. John Doe-39

On August 16, 2014, SFPD officer responded to Hyde Street at UN Plaza regarding a report of illegal narcotics activity in the area. Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00664. There, they saw [REDACTED] ("John Doe-39")⁴⁴ illegally riding his bicycle on the sidewalk. *Id.* The officers detained Doe-39 to issue a traffic citation, and a computer search revealed that "he was on active probation." *Id.* The officers conducted a probation search of his person and found 4.9 grams (gross) of powder cocaine in fourteen "individually wrapped bindles." *Id.*

NN. John Doe-40

While conducting a surveillance operation on December 5, 2013 at the intersection of Hyde and Turk Streets, SFPD officers observed [REDACTED] ("John Doe-40") engage in a suspected narcotics transaction. Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00605.⁴⁵ The officers arrested Doe-40 and found two crack rocks on his person. *Id.* The officers found one crack rock on the person of the woman to whom he sold. *Id.* Doe-40 was subsequently charged in S.F. Superior Court under H&S Code sections 11352(a), 11351.5, and 11350(a). Ex. 1, Koeninger Disco. Mtn. Decl., Att. F at Ex.02182.

⁴⁴ The SFPD incident report identifies Doe-39 as Hispanic ("H").

⁴⁵ The SFPD incident report identifies Doe-40 as Hispanic ("H"). *Id.*

1 OO. John Doe-41

2 While “conducting a narcotics surveillance operation in the area of Golden Gate/Hyde
3 Street” on December 26, 2013, SFPD officers “observed a Hispanic male,” [REDACTED] (“John
4 Doe-41”), standing on the street corner. Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00254.
5 The officers were aware that Doe-41 was “a known narcotics dealer in the area.” *Id.* In fact, two
6 months earlier, two of the same officers “placed [Doe-41] under arrest at the same intersection
7 for cocaine base sales.” *Id.*

8 The officers saw Doe-41 spit two “off white rocks” and give them to man who had just
9 given him “U.S. currency.” *Id.* After arresting the buyer, the officers recovered two rocks of
10 crack cocaine from his pocket. *Id.* Their arrest of Doe-41 yielded \$217. *Id.*

11 PP. John Doe-42

12 On December 10, 2013, an SFPD officer was patrolling the Tenderloin on a motorcycle.
13 Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00609. At the intersection of Turk and Hyde,
14 the officer saw a Hispanic male, [REDACTED] (“John Doe-42”), riding his bicycle against traffic
15 on Hyde Street. *Id.* The officer conducted a traffic stop, and during a subsequent search of Doe-
16 42’s person, the officer found five pills, “three packages of methamphetamine . . . packaged for
17 sales” and an “amount of heroin” that was “not for personal use.” *Id.* at Ex.00609-610.

18 Doe-42 was booked at Tenderloin Station for violating H&S Code sections 11351,
19 11375(b)(2), and 11378. According to San Francisco’s CMS, Doe-42 has previously been
20 charged with drug-trafficking crimes on six prior occasions: January 2012; April 2011;
21 December 2010; February 2010; November 2009; and March 2001. *See* Ex. 1, Koeninger Disco.
22 Mtn. Decl., Att. F at Ex.02158.

23 VI. Incidents of Racial Bias by SFPD Generally

24 A. Racial disparity

25 A study by the Haywood Burns Institute that was commissioned by the Reentry Council of
26

the City and County of San Francisco shows that Black adults are 7.1 times as likely as White adults to be arrested, 11 times as likely to be booked into County Jail and 10.3 times as likely to be convicted of a crime in San Francisco. Declaration of Galia Amram Phillips In Support of July 2015 Case Management Statement (“July CMC Decl.”), Exh. A. [Docket. No. 44]. The study also showed that despite a significant reduction in arrest rates in San Francisco, the disparity gap – the relative rate of arrest for Black adults compared to White adults – is increasing, including for drug offenses. *Id.* at 15. The data is particularly stark for Black women. They represent 5.8% of the city’s female population but account for 45.55% of all female arrests in 2013, and 68.8% of narcotics arrests. Ex. 41, Amram Disco. Mtn. Decl., Att. B. Blacks in San Francisco are also cited for resisting arrest at a rate eight times greater than Whites even when serious crimes are not involved. Ex. 41, Amram Disco. Mtn. Decl., Att. C. “Data and sentiment shows that women and men of color are disproportionately stopped or questioned by police.” Ex. 41, Amram Disco. Mtn. Decl., Att. D (quoting SF Supervisor Malia Cohen when explaining her proposed ordinance to require SFPD officers to collect data on the race of all people stopped by law enforcement).

B. Racist texts

On February 25, 2014, the USAO filed criminal charges, including drug charges, civil rights violations and fraud charges, against three SFPD officers: Ian Furminger, Edmond Robles and Reynaldo Vargas. Indictment, *United States v. Edmond Robles et al*, No. 14cr102 (N.D. Cal. filed 02/25/14) (Docket No. 1); Superseding Indictment, *United States v. Edmond Robles et al*, No. 14cr102 (N.D. Cal. filed 10/30/14) (Docket No. 113). In November 2014, the case went to trial, and both Furminger and Robles were convicted of various counts. Minute Order, *United States v. Edmond Robles et al*, No. 14cr102 (N.D. Cal. filed 12/01/14) (Docket No. 174); Verdict Form, *United States v. Edmond Robles et al*, No. 14cr102 (N.D. Cal. filed 12/05/14) (Docket No. 180). On March 31, 2015, the USAO filed a declaration in the Robles/Furminger case from FBI Agent Tyler Nave (“Nave Declaration”). The Nave Declaration was in response to Furminger’s

1 motion for bail pending the appeal of his conviction. The Nave Declaration revealed racist text
 2 messages involving at least four SFPD officers including Furminger. Phillips Related Case
 3 Decl., Att. I [Docket No. 247-1 in *United States v. Furminger*, No. 14-102 CRB].

4 Although Nave did not state the exact date that he obtained the text messages, Nave did
 5 declare that the FBI obtained the test messages “[d]uring the investigation that led to this case.”
 6 *Id.* at ¶ 2.⁴⁶ Moreover, on November 5, 2014, SFPD Officer Robles filed a Motion In Limine to
 7 exclude a test message from trial in which Robles texted the word “nigga” to SFPD Officer
 8 Furminger. Defendant Edmond Robles’ Motion To Exclude Evidence Of Text Messages at 1,
 9 *United States v. Edmond Robles et al*, No. 14cr102 (N.D. Cal. filed 11/05/14) (Docket No. 122).
 10 So presumably, the USAO was aware of the text messages at least before the 2014 Operation
 11 Safe Schools sweep.

12 In the text messages, the officers use the phrase “White Power!” They also state:

- 13 1) “We got two blacks at my boys school and they are brother and sister! There cause dad
 14 works for school district and I am watching them like hawks.”
- 15 2) “Do you celebrate quanza at your school? Yeah we burn the cross on the field! Then we
 16 celebrate Whitemas.”
- 17 3) “Its worth every penny to live here away from the savages.”
- 18 4) “Those guys are pretty stupid! Ask some dumb ass questions you would expect from a
 19 black rookie!”
- 20 5) “The buffalo soldier was why the indians Wouldn’t shoot the niggers that fought for the
 21 confederate They though they were sacred buffalo and not human.”
- 22 6) “They were not far off Marley was a nigger.”
- 23 7) “the indians never had shit Columbus thought he landed where he headed India So HE
 24 named them indians They never had a name of their own And the n re is evidence that the

25 ⁴⁶ There is an allegation that the supervisors in the SFPD knew about the texts as early as 2012.
 26 Ex. 41, Amram Disco. Mtn. Decl., Att. E.

1 moors niggers were here first.”

2 8) “Gunther Furminger was a famous slave auctioneer.”

3 9) “I cant imagine working At Costco and hanging out with filthy flips. hate to sound racist
4 but that group is disgusting.”

5 10) “He would be so much better off had he married a white chick with a brain he would
6 have a nice house with white kids that were not as ghetto as his are.”

7 11) “Just saw on news there was a peace march in oakland. everyone marching was white.”

8 12) “My wife has 2 friends over that dont know each other the cool one says to me get a
9 drink nigger not knowing the other is married to one just happened right now LMFAO.”

10 13) “[name redacted] walked up to [name redacted] and said Break yo-self nigga! Then
11 [name redacted] said, dont make me go old school on yo bitch ass nigga!”

12 14) White Power Family, [Furminger home address redacted]

13 15) “All good, I still hate black people!”

14 16) “Niggers should be spayed.” “I saw one an hour ago with 4 kids. See. That would be
15 four less.”

16 17) “I am just leaving it like it is, painting KKK on the sides and calling it a day!”

17 18) “Cross burning lowers blood pressure! I did the test myself!”

18 19) “So do I. Every camping trip i burn an image of the prez.”

19 20) “At his school! Multi purpose room! Their shouldnt be any blacks!”

20 21) “All niggers must fucking hang.”

21 22) “Just boarded train at Mission/16th.” “Ok, watch out for BM’s.” “Too late. I’m
22 surrounded. And the only gun I have is broken!” “Your fucked.” “Dumb nig nugs.”

23 23) “20,000 bees are in Vacaville near School but they are not dangerous like black people.”

24 24) “You are a total homo! And your gay!”

25 25) “We decided to chill but ended up going to BC house for first half of fight! Home around
26 9 ish.” “Cool...who won that...cotto..not” “No, the nigger!”

27
28 NOTICE OF MOTION AND MOTION TO COMPEL DISCOVERY ON SELECTIVE PROSECUTION AND
 ENFORCEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION
 CASE NO. CR 14-643 EMC

26) “I hate to tell you this but my wife friend is over with their kids and her husband is black!

If is an Attorney but should I be worried.” “Get ur pocket gun. Keep it available in case the monkey returns to his roots. Its not against the law to put an animal down.” “Well said!” “U may have to kill the half breed kids too. Don’t worry. Their an abomination of nature anyway.”

27) “Dude. Your boy made Q50. Sgt. Aj Holder.” “Fuckin nigger.” “Lol and Yolanda Williams.” “Or my.” “Nigger bitch.”

28) “Your sister lies more than any nigger I have ever met in my life. You awake?”

Phillips Related Case Decl., Att. I [Docket No. 247-1 in *United States v. Furminger*, No. 14-102 CRB].

VII. Evidence of Racial Bias in Operation Safe Schools Officers and in Tenderloin Policing

A. Evidence of Racial Bias Produced in Discovery in Operation Safe Schools Cases

In the video produced in *United States v. Acacia McNeal*, No. 15-028 CRB, while the camera is trained on a group of two Black women and two Black men, a law enforcement officer is heard loudly stating “fucking BMs.” Phillips Related Case Decl., Att. F, 20141201163257.MTS, at 00:45. Immediately after this exclamation, another officer warns, in an apparent reference to the running video, “shh, hey, I’m rolling.” *Id.* In response to a defense request, the government revealed which officer made the “fucking BM” comment, and which officer said “shh, hey, I’m rolling.” Ex. 5, Under Seal Declaration of Galia Amram Phillips in Support of Motion to Compel Discovery on Selective Prosecution and Enforcement, ¶ 5 at Ex.02857. Those officers worked on at least 17 other Operation Safe School cases. Ex. 2, Ultan Related Case Decl., ¶¶ 2-3 at Ex.02232-33.

In the video produced in discovery in *United States v. Cassie Roberts*, No. 13-760 CRB, the undercover informant tries to buy drugs from Ms. Roberts, a Black woman. Ms. Roberts,

1 who is on the phone, doesn't respond initially. An Asian woman approaches the confidential
 2 informant and offers to sell drugs, but the informant declines and waits for Ms. Roberts to get off
 3 of the phone. Phillips Related Case Decl., Att. G at 06:45 and 13:15 (recording the informant
 4 explaining to the agents that Ms. Roberts was not paying attention to him [the informant], but he
 5 got her attention and avoided the "Asian chick" by saying he wants the "good shit.").

6 B. Incidents of Racial Bias By SFPD Officers In The Tenderloin

7
 8 These specific incidents described above, caught on videotape, mirror years of poor
 9 treatment of Blacks by law enforcement officers in the Tenderloin. Dominique Leslie, who has
 10 worked in the Tenderloin area for 15 years, notes that:

11 I have lived and worked in the Tenderloin area for fifteen (15) years and have
 12 personal experience interacting with and observing police officers in San
 13 Francisco's Tenderloin neighborhood. In July of 2015, we moved our office from
 14 472 Turk Street to 233 Eddy Street. At our Turk Street address, most of the hand
 15 to hand street drug transactions I observed were being conducted by Hispanics,
 16 with seemingly very little police activity. At our Eddy Street location most hand
 17 to hand street drug transactions I witness are conducted by African Americans,
 18 where I have observed a large and seemingly disproportionate presence of police
 activity as compared to our Turk Street location. The amount of hand to hand
 transactions I observe are every bit as frequent now as they were a year ago, and
 the police focus on African American drug dealers over other ethnic group drug
 dealers seems to be the same as a year ago.

19 Ex. 36, Declaration of Dominique Leslie, ¶¶ 1-3 at Ex.3066-70.

20 In addition, Operation Safe Schools defendants – including some who are not part of this
 21 motion – have signed and submitted sworn declarations concerning the treatment they have
 22 experienced by police officers in the Tenderloin. Like Dominique Leslie, the Operation Safe
 23 School defendants are aware that law enforcement officers in the Tenderloin routinely give more
 24 attention to Blacks than individuals of other races. Ex. 37, Declaration of Erwin Mackey, ¶ 3 at
 25 Ex.03071-72; Ex. 31, Declaration of Shavon Gibson, ¶ 2 at Ex.03044-46; Ex. 29, Declaration of
 26 Wendell Johnson, ¶ 2 at Ex.03034-38; Ex. 7, Declaration of Saquita Nash, ¶ 3 at Ex.02935-39;
 27 Ex. 8, Declaration of Aaron Mathews, ¶ 2 at Ex.02940-41; Ex. 9, Declaration of Acacia McNeal,

¶ 2 at Ex.02942-46; Ex. 10, Declaration of Angela Jones, ¶ 2 at Ex.02947-51; Ex. 11, Declaration of Anita Dixon, ¶ 2 at Ex.02952-56; Ex. 12, Declaration of Crystal Anthony, ¶ 2 at Ex.02957-61; Ex. 13, Declaration of Darrell Powell, ¶ 2 at Ex.02962-63; Ex. 14, Declaration of Darlene Rouse, ¶ 2 at Ex.02964-68; Ex. 15, Declaration of Hobert Lee, ¶ 2 at Ex.02969-73 (noting that when he is accompanied by his Caucasian wife, officers do not question her as they do him); Ex. 16, Declaration of Lakeysha White, ¶ 2 at Ex.02974-78; Ex. 17, Declaration of Matthew Mumphrey, ¶ 2 at Ex.02979-83; Ex. 18, Declaration of Mellina Williams, ¶ 2 at Ex.02984-88; Ex. 19, Declaration of Nijah Reed, ¶ 2 at 02989-90; Ex. 20, Declaration of Sholanda Adams, ¶ 2 at 02991-95; Ex. 21, Declaration of Tiana Reddic, ¶ 2 at Ex.02996-03000; Ex. 22, Declaration of William Brown, ¶ 2 at Ex.03001-02; Ex. 35, Declaration of Ebony Wallace, ¶ 2 at Ex.03060-65.

As Erwin Mackey explained: “Police patrols and arrests in the Tenderloin primarily occur on blocks occupied by African American individuals ... In my experience, the police do not harass, arrest or conduct raids on the Honduran dealers that sell within blocks of the Federal Building. They also do not appear to harass the Hondurans that sell drugs on Hyde Street or the Filipino dealers that are concentrated on Leavenworth Avenue between Turk and Eddy Streets.” Ex. 37, Mackey Decl., ¶ 4 at Ex.03071-72. As described in detail below, police harassment of Blacks in the Tenderloin has taken many forms.

1. Use Of Racial Slurs By SFPD Officers In The Tenderloin

Defendants have also heard law enforcement officers in the Tenderloin use racial slurs. Shavon Gibson, Wendell Johnson, Latoya Jackson, David Madlock, Lakeysha White, Acacia McNeal, Jamella Jules and Anita Dixon have all heard officers refer to Black females as “black bitches.” Ex. 31, Gibson Decl., ¶ 4 at Ex.03044-46; Ex. 29, Johnson Decl., ¶ 3 at Ex.03034-38; Ex. 34, Jackson Decl., ¶ 2 at Ex.03055-59; Ex. 16, White Decl., ¶ 3 at Ex.02974-78; Ex. 24, Jules Decl., ¶ 2 at Ex.03008-12; Ex. 23, Madlock Decl., ¶ 2 at Ex.03003-07; Ex. 9, McNeal Decl., ¶ 3 at Ex.02942-46; Ex. 11, Dixon Decl., ¶ 3 at Ex.02952-56. Tiana Reddic has been

called “little black girl” by Officer Ryan. Ex. 21, Reddic Decl., ¶ 5 at Ex.02996-03000. *See also* Ex. 30, Cross Decl., ¶ 2 at Ex.03039-43; Ex. 35, Wallace Decl., ¶ 3 at Ex.03060-65; Ex. 7, Nash Decl., ¶ 5 at Ex.02935-39; Ex. 9, McNeal Decl., ¶ 3 at Ex.02942-46; Ex. 12, Anthony Decl., ¶ 3 at Ex.02957-61; Ex. 19, Reed Decl., ¶ 3 at Ex.02989-90 (describing being referred to, or hearing a Tenderloin officer refer to a Black woman, as “bitch”). SFPD Officer Crosby made a comment to Crystal Anthony like “you stuffing shit in your pussy bitch.” Ex. 12, Anthony Decl., ¶ 3 at Ex.02957-61. Angela Jones has heard SFPD officers “refer to people as ‘bitches’ and use phrases such as ‘sit your black ass down’ when speaking to African-American people.” Ex. 10, Jones Decl., ¶ 4 at Ex.02947-51.

David Madlock has been referred to as “boy,” by Caucasian police officers in the Tenderloin. Ex. 23, Madlock Decl., ¶ 3 at Ex.03003-07. And three others have heard SFPD officers in the Tenderloin refer to Black men as “boy.” Ex. 35, Wallace Decl., ¶ 3 at Ex.03060-65; Ex. 29, Johnson Decl., ¶ 3 at Ex.03034-38; Ex. 24, Jules Decl., ¶ 2 at Ex.03008-12. Five people have heard officers in the Tenderloin use the word “nigger.” Ex. 29, Johnson Decl., ¶ 3 at Ex.03034-38; Ex. 34, Jackson Decl., ¶ 2 at Ex.03055-59; Ex. 16, White Decl., ¶ 3 at Ex.02974-78; Ex. 24, Jules Decl., ¶ 2 at Ex.03008-12; Ex. 22, Brown Decl., ¶ 3 at Ex.03001-02. An SFPD officer whom Erwin Mackey knows “as Darren yelled that I ‘better get [my] black ass off the block.’” Ex. 37, Mackey Decl., ¶ 3 at Ex.03071-72. Moreover, in 2014, Ebony Wallace witnessed Officers Goff, Scafani and another SFPD officers harass a small group of Black teenagers. One of the officers told the group, “Hands up, don’t shoot!” Wallace believed the comment was intended to make fun of the Black Lives Matter Movement. Ex. 35, Wallace Decl., ¶ 7 at Ex.03060-65.

2. Incidents of Sexually Inappropriate Behavior By SFPD Officers Against Black Women

Many of the defendants have also witnessed San Francisco police officers act sexually inappropriately toward Black females. Ex. 30, Declaration of Tiffany Cross, ¶ 3 at Ex.03039-43;

Ex. 35, Wallace Decl., ¶ 4 at Ex.03060-65; Ex. 7, Nash Decl., ¶ 3 at Ex.02935-39; Ex. 18, Williams Decl., ¶ 3 at Ex.02984-88; Ex. 17, Mumphrey Decl., ¶ 3 at Ex.02979-83; Ex. 8, Mathews Decl., ¶ 3 at Ex.02940-41; Ex. 12, Anthony Decl., ¶ 4 at Ex.02957-61; Ex. 23, Declaration of David Madlock, ¶ 4 at Ex.03003-07; Ex. 24, Declaration of Jamella Jules, ¶ 3 at Ex.03008-12; Ex. 16, White Decl., ¶ 4 at Ex.02974-78; Ex. 19, Reed Decl., ¶ 4 at Ex.02989-90; Ex. 21, Reddic Decl., ¶ 3 at Ex.02996-03000; Ex. 34, Declaration of Latoya Jackson, ¶ 3 at Ex.03055-59. There is a well-documented connection between racism and sexual violence against Black women. Ex. 41, Amram Disco. Mtn. Decl., Att. P (Article from the National Resource Center on Domestic Violence on Sexual Violence in the Lives of African-American Women); Danielle McGuire, *At the Dark End of the Street: Black Women, Rape and Resistance – A New History of the Civil Rights Movement from Rosa Parks to the Rise of Black Power*, New York: Knopf (2010).⁴⁷

Officer Ryan, who worked on Operation Safe Schools, is a particular problem. In or around 2008, while transporting Acacia McNeal to the San Francisco County Jail, Ryan said “I just got married and you better be glad . . . or I’ll take some black pussy.” Ex. 9, McNeal Decl., ¶ 5 at Ex.02942-46. In February 2013, Ryan made a comment to Angela Jones during an arrest that “You should be doing something else with that body, you could making that money doing something else other than selling drugs.” Ex. 10, Jones Decl., ¶ 5 at Ex.02947-51. Darlene Rouse has heard Ryan “make statements such as, ‘I like big titties,’ and ‘you look just like my wife.’” Ex. 14, Rouse Decl., ¶ 4 at Ex.02964-68. Ryan has made statements to Jamella Jules about the size of his penis. He implied that it was large. In 2009, while talking to Jules, Ryan pointed to a woman and said, “Do you see the girl back there? If you suck dick like her then you’ll get out of trouble too.” Ex. 24, Jules Decl., ¶ 3 at Ex.03008-12. Tiffany Cross has also

⁴⁷ In addition, some officers who mistreated Black women also used racial slurs. *See e.g. supra* and *infra* (noting that Officer Ryan used the term “little black girl,” and “I’ll take some black pussy.”)

1 had disturbing interactions with Ryan. On one occasion, as Cross was walking with a friend, Ms.
 2 Turner, Ryan approached while driving his police vehicle. He rolled down the window and
 3 asked Ms. Turner, “When are you going to suck my dick?” Ex. 30, Cross Decl., ¶ 3 at Ex.03039-
 4 43. Another time, Ryan made sexually inappropriate comments to Cross about her tongue ring.
 5 He told other officers who were standing nearby, “Leave her alone, she has a tongue ring.
 6 There’s something that I can do with her later.” *Id.*

7 Ryan has physically searched Mellina Williams on occasions, rather than having a female
 8 officer do so, and has repeatedly made comments to her like, “Oh yeah, you looking good today”
 9 and “You’ve got a big butt.” Ex. 18, Williams Decl., ¶ 5 at Ex.02984-88. Ryan has also made
 10 several sexually inappropriate comments to Nijah Reed. On one occasion he told her, “let me
 11 take you out.” On another occasion he said, “you probably have some good stuff” which she
 12 thought meant that he wanted to have sex with her. Ryan also requested to smell her hands
 13 because he believed that she had placed drugs in her genital area and that her hands smelled like
 14 her vagina. Ex. 19, Reed Decl., ¶ 5 at Ex.02989-90. In 2012, while Saquita Nash was detained
 15 at the Tenderloin Police Station, several unknown female police officers attempted to conduct a
 16 vaginal cavity search of her. She resisted the search. Later, Ryan came into the room where she
 17 was being held and screamed at her, “Quit fucking around Ms. Nash!” Ex. 7, Nash Decl., ¶ 4 at
 18 Ex.02935-39. “While I continued to be handcuffed, he turned me around and forcibly spread my
 19 legs from behind. While another female officer held me down, Ryan attempted to remove a bag
 20 of drugs from my vagina. I screamed “help me, help me!” Ryan ultimately extracted the drugs
 21 from my vagina, but I felt extremely violated in the process.” Ex. 7, Nash Decl., ¶ 4 at
 22 Ex.02935-39.⁴⁸ See also Ex. 20, Adams Decl., ¶ 3 at Ex.02991-95 (noting that Ryan is known in
 23 the Tenderloin neighborhood for harassing Blacks and that Ryan made her uncomfortable
 24 because he made comments to her that made her feel that he was speaking to her in a sexually

25 ⁴⁸ Nash also heard Ryan make comments that women who are confidential informants for him
 26 are “bitches that work for me.” Ex. 7, Nash Decl., ¶ 5 at Ex.02935-39.

1 inappropriate manner.) In another instance, Ryan made inappropriate comments and gestures to
2 Ebony Wallace while he was on duty. Wallace witnessed Ryan pulling at his crotch while he
3 said, “Hey girls, get it up there!” Ex. 35, Wallace Decl., ¶ 5 at Ex.03060-65.

4 Ebony Wallace also witnessed Officer Goff flirt with some of her friends while he was
5 working in the Tenderloin. In 2014, he told Wallace and a few of her female friends, “I saw your
6 pictures on Instagram and they looked real real nice.” The tone in his voice and the way he
7 delivered the statement “made us feel uneasy. He seemed to take pleasure in being able to look
8 at our personal photographs online.” Ex. 35, Wallace Decl., ¶ 4 at Ex.03060-65. Officer Crosby
9 has also sexually harassed Black females. In 2013, Crosby, dressed in street clothing,
10 approached Lakeysha White on Sixth Street and said, “I want to handcuff you to a bed and fuck
11 you.” Ex. 16, White Decl., ¶ 5 at Ex.02974-78. On other occasions, he has referred to her as his
12 “girlfriend” and told other people to “stop talking to my girl.” *Id.*

13 Inappropriate searches of Black women in the Tenderloin by other male law enforcement
14 officers are also an issue. This happened to Acacia McNeal on two separate occasions within the
15 last five years. “On both occasions, the most recent having occurred approximately two years
16 ago, a male officer searched me, touched my breasts and unclasped my bra. I objected to the
17 search, but the officer continued.” Ex. 9, McNeal Decl., ¶ 4 at Ex.02942-46. David Madlock
18 has “witnessed police officers take pleasure in conducting physical searches of their genitals and
19 buttocks. Some of the officers will show their pleasure by smiling and/or spending an unusually
20 long time to search this area of the body. On multiple occasions, I’ve witnessed male officers
21 put their hands inside of a woman’s pants instead of waiting for a female officer to conduct the
22 search.” Ex. 23, Madlock Decl., ¶ 4 at Ex.03003-07.

23 Latoya Jackson was the victim of an inappropriate search by SFPD Officer Goff. In
24 2012, Goff performed a probation search of her. “While performing the search, Officer Goff
25 touched my breasts. His search did not feel like a typical pat-down search that I would receive
26 from a female officer, it was more like he groped me. Officer Goff told me that he didn’t mean
27

28 NOTICE OF MOTION AND MOTION TO COMPEL DISCOVERY ON SELECTIVE PROSECUTION AND
ENFORCEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION
CASE NO. CR 14-643 EMC

1 to do it but I sensed that it was intentional.” Ex. 34, Jackson Decl., ¶ 4 at Ex.03055-59. Jackson
 2 then discovered that Goff had been looking at her photographs on Instagram after he made
 3 comments about her pictures. *Id.* at ¶ 5. Shavon Gibson has been arrested many times in the
 4 Tenderloin and as part of the arrest she is often searched. “One day a male policeman, of Arab
 5 descent, decided he was going to search me rather than wait for a female officer. The man pat
 6 me down very aggressively, patting my behind and reaching around to pat down my crotch
 7 area.” Ex. 31, Gibson Decl., ¶ 6 at Ex.03044-46.

8 9 **3. Acts Of Violence By SFPD Officers In The Tenderloin Against Blacks**

10 Some defendants have witnessed SFPD officers commit acts of violence against Blacks,
 11 or had acts of violence committed against them. *See* Ex. 37, Mackey Decl., ¶ 5 at Ex.03071-72
 12 (“While out in the neighborhood I have seen brutal interactions between the police and African
 13 Americans.”) Officer Hope was particularly rough with Sholanda Adams. “I was just going to
 14 work as an in-home care worker in September 2014. At the time I was pregnant. The officers
 15 detained me, grabbed my arms, and were forceful with me. They also harassed my client, an
 16 African-American gentleman who was at the time using a cane and recovering from a stroke who
 17 had come over to where I was. They pushed him against a car and roughed him up.” Ex. 20,
 18 Adams Decl., ¶ 4 at Ex.02991-95.⁴⁹ In 2014, Ebony Wallace witnessed Officer Goff and two
 19 other SFPD officers driving in the Tenderloin neighborhood in a burgundy/deep cherry Malibu.
 20 “The officers appeared to be playing around while on patrol. They drove around the
 21 neighborhood with their firearms hanging outside the windows of the car. The look on their
 22 faces made it clear that they were having a good time.” This incident made Wallace feel very
 23 unsafe and uneasy. Ex. 35, Wallace Decl., ¶ 6 at Ex.03060-65. Aaron Mathews watched Officer

24
 25 ⁴⁹ *See also* Ex. 33, Declaration of Leonard Amedee, ¶¶ 1-3 at Ex.03053-54 (confirming that he
 26 was walking with Sholanda Adams in the fall of 2014 when SFPD officers “grabbed her out of
 27 nowhere.”).

1 Nocetti place a man in a chokehold until “blood vessels in his eyes appeared to pop, turning
 2 Joe’s eyes red.” Ex. 8, Mathews Decl., ¶¶ 4 at Ex.02940-41. Anita Dixon’s foot was stomped
 3 on by an SFPD officer trying to wake her up. Ex. 11, Dixon Decl., ¶ 4 at Ex.02952-56.

4 William Brown was choked, kicked and punched by officers in the area of Taylor and
 5 Market Streets. Ex. 22, Brown Decl., ¶ 4 at Ex.03001-02. Darrell Powell was hit by five or six
 6 officers in the fall of 2014. Ex. 13, Powell Decl., ¶ 4 at Ex.02962-63. David Madlock has
 7 “witnessed at least thirty separate occasions where the police have beaten or been physically
 8 aggressive towards African-Americans. Some of the beatings occurred even after the person had
 9 been in handcuffs.” Ex. 23, Madlock Decl., ¶ 5 at Ex.03003-07. Tiffany Cross watched Officers
 10 Ryan and Razz run their car into an Black woman who was attempting to avoid arrest. Ex. 30,
 11 Cross Decl., ¶ 4 at Ex.03039-43. Erwin Mackey saw Tenderloin police officers punch a heroin
 12 addict who did not move quickly enough when the police told him to get off the block. Ex. 37,
 13 Mackey Decl., ¶ 5 at Ex.03071-72.

14 In 2013, near the corners of Eddy and Mason Streets in the Tenderloin, Officer Ryan
 15 stopped Tiana Reddic and her girlfriend, Tierra Santalucia:

16
 17 He suspected that we were in possession of drugs. He and another officer patted
 18 us down. Ryan then made a comment, referring to me, that he was “gonna send
 19 this bitch back to prison where I sent her before.” Ryan then made another
 20 comment to his fellow officer and said, “Make it easier, how about I just handcuff
 21 them and put them in the police car and drive them to Candlestick and put a bullet
 22 in their heads.” He further stated, “next time I see you, I’m going to give you a
 23 case and send you the fuck back to prison.”

24 Ex. 21, Reddic Decl., ¶ 4 at Ex.02996-03000.

25 Officer Ryan has also threatened Shavon Gibson. Ryan said he would take Gibson to jail
 26 if she did not leave the area. “He has also told me that even if I did not have drugs on me he
 27 would plant some on me and then take me to jail.” Ex. 31, Gibson Decl., ¶ 5 at Ex.03044-46.
 28 Wendell Johnson likewise had a deeply traumatic experience with Ryan:

In November 2012, Officer Shaughn Ryan passed me while driving his police

vehicle in the Tenderloin neighborhood. Officer Ryan abruptly stopped his vehicle and exited the car. He drew his gun and pointed it directly at me. He yelled, “who are you?” I quickly provided him with my name. Officer Ryan placed me under arrest, handcuffed me and then he escorted me across the street to a police vehicle. I asked Officer Ryan multiple times why I was being arrested. He responded, “shut your mouth.” I continued to ask him why I was being arrested. I wanted clarification about what was happening because I had not done anything wrong. Officer Ryan appeared agitated by my questioning and he became even more upset when he discovered that I didn’t know his name or who he was in the neighborhood. For some reason he expected me to know him or at least know of him. At this point he began to threaten me. He said, “I’m going to kill you mother fucker and shoot you in your head.” I was terrified that he was going to kill me especially since it was dark and late at night. Two other San Francisco police officers were present when he made these statements; I did not recognize the other officers and I do not know their names.

Ex. 29, Johnson Decl., ¶ 4 at Ex.03034-38.

ARGUMENT

I. Selective Prosecution

A. Legal Standard

1. **United States v. Armstrong**

In *United States v. Armstrong*, 517 U.S. 456, 469 (1996), the Supreme Court determined the standard for selective prosecution claims. Noting that the “requirements for a selective prosecution claim draw on ordinary equal protection standards,” the Court held that a claimant “must demonstrate that the federal prosecutorial policy had a discriminatory effect and that it was motivated by a discriminatory purpose.” *Id.* at 465 (internal citations omitted).

In order to obtain discovery, the defense must produce “some evidence tending to show the existence of the discriminatory effect element.” *Id.* at 469. Notably, the Supreme Court never stated that a defendant needs to produce “some evidence” of the discriminatory intent element to obtain discovery of a selective prosecution claim. *See id.*⁵⁰ To show “some

⁵⁰ Despite this, some courts have held that a defendant needs to produce “some evidence” of both discriminatory effect and discriminatory intent to receive discovery on selective prosecution. *See United States v. Venable*, 666 F.3d 893, 900 (4th Cir. 2012); *United States v. Lewis*, 517 F.3d

1 evidence” of the discriminatory effect prong, the defense must “produce some evidence that
 2 similarly situated defendants of other races could have been prosecuted, but were not.” *Id.* This
 3 “rigorous standard,” the Supreme Court concluded, “adequately balances the Government’s
 4 interest in vigorous prosecution and the defendant’s interest in avoiding selective prosecution.”
 5 *Id.* at 470.

6 Applying the standard to the case before it, the Supreme Court found that the proffered
 7 evidence failed to pass the necessary threshold. The study proffered by the Federal Public
 8 Defender’s office in that case — which indicated that every one of the twenty-four cocaine cases
 9 closed by the office in 1991 involved defendants who were Black — “failed to identify
 10 individuals who were not black and could have been prosecuted for the offenses for which
 11 respondents were charged, but were not so prosecuted.” *Id.* The Court also found that a
 12 proffered newspaper article, “which discussed the discriminatory effect of federal drug
 13 sentencing laws, was not relevant to an allegation of discrimination in decisions to prosecute.”
 14 *Id.* Finally, the Court explained that affidavits, “which recounted one attorney’s conversation
 15 with a drug treatment center employee and the experience of another attorney defending drug
 16 prosecutions in state court, recounted hearsay and reported personal conclusions based on
 17 anecdotal evidence.” *Id.*

18 Overall, the *Armstrong* court made clear that the main failure of the defense was in not
 19 identifying similarly-situated persons of other races who could have been prosecuted but were
 20 not. *Id.* at 470. Relatedly, *Armstrong* explained that the defense could have met its burden by
 21 identifying members of other races who were charged in state court for the crime at issue in the
 22 selective enforcement litigation, but not charged federally. *Id.* at 470. In fact, in its reply brief in
 23 the *Armstrong* case, the Solicitor General argued that the defendants had failed to avail

24 20, 25 (1st Cir. 2008); *United States v. Sepulveda*, 952 F.Supp.94, 96 (D.R.I. 1997); *United*
 25 *States v. Olvis*, 97 F.3d 739, 743 (4th Cir.1996). Other cases have required only “some
 26 evidence” of discriminatory effect. *United States v. Al Jibori*, 90 F.3d 22, 25 (2d Cir. 1996);
United States v. Paxton, 2014 WL 1648746 (N.D. Ill., Apr. 17, 2014).

1 themselves of California state court records that were open to inspection and could provide
 2 supporting data. *See United States v. Armstrong*, No. 95-157, 1996 WL 67650, at *16–17
 3 (U.S.Reply.Brief, filed Feb. 15, 1996). Despite this, case law subsequent to *Armstrong* shows
 4 that when *Armstrong* motions are meritorious, it is often because lower courts have ordered the
 5 government to provide discovery even when the defense has not identified similarly-situated
 6 individuals of other races. *See United States v. Davis*, 766 F.3d 722, 731 (7th Cir. 2014), *rev'd*
 7 *and remanded en banc*, 793 F.3d 712 (7th Cir. 2015) (discussing the stash-house cases in the
 8 Northern District of Illinois in which numerous district courts granted discovery based on
 9 statistics); *United States v. Tuitt*, 68 F. Supp. 2d 4 (D. Mass. 1999); *United States v. Al Jibori*, 90
 10 F.3d 22, 25-26 (2d Cir. 1996).

11 **2. Discriminatory Effect Prong Of A Selective Prosecution Claim**

12
 13 “To establish a discriminatory effect in a race case, the claimant must show that similarly
 14 situated individuals of a different race were not prosecuted.” *Armstrong*, 517 U.S. at 465.
 15 Courts have held that the discriminatory effect prong may be shown by statistical evidence.
 16 *Chavez v. Illinois State Police*, 251 F.3d 612, 638 (7th Cir. 2011); *Davis*, 766 F.3d at 731
 17 (discussing the stash-house cases in the Northern District of Illinois in which numerous district
 18 courts granted discovery based on statistics); *Tuitt*, 68 F. Supp. 2d 4; *United States v. Duque-*
 19 *Nava*, 315 F.Supp.2d 1144, 1156 (D. Kan. 2004) (“While helpful, purely statistical evidence is
 20 rarely sufficient to support an equal protection claim, but can be sufficient to establish
 21 discriminatory effect.”) *Cf. United States v. Turner*, 104 F.3d 1180, 1185 (9th Cir. 1997) (noting
 22 that the statistics in *Armstrong* did not “advance a defense of selective prosecution without
 23 further consideration of the sociological factors affecting the pattern of crime and without a
 24 showing that similarly-situated defendants of other races had been left unprosecuted”).

25 In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), for example, discriminatory effect was
 26 proved by showing that all 200 applications by Chinese launderers were denied, while only 1 of
 27

90 applications by White launderers was denied. Similarly, in *Hunter v. Underwood*, 417 U.S. 222, 228 (1985), the Supreme Court was satisfied with a showing that the law at issue made disenfranchisement of Blacks at least 1.7 times more likely than disenfranchisement of Whites. In using statistics, the defense must not assume that members of a particular racial group commits crimes at a rate proportionate to their representation in the overall population. *United States v. Arenas-Ortiz*, 339 F.3d 1066, 1069 (9th Cir. 2003) (citing *Armstrong*, 517 U.S. at 469-70.)

a. Definition of Similarly Situated

The Supreme Court did not define “similarly situated” in *Armstrong*, nor in any case since. In *Turner*, the Ninth Circuit did not provide an overall definition of similarly-situated but did hold that the statistics presented by the defense were unimpressive because there was “no showing at all that the crack cocaine sellers prosecuted by California were gang members who sold large quantities of crack; so the principal characteristic of the federal defendants is omitted.” *Turner*, 104 F.3d at 1185.⁵¹ In so holding, the Ninth Circuit explained “that such gangs should be targeted is a neutral, nonracial law enforcement decision; the distribution of cocaine by gang members inclined to violence makes the distribution more heinous and more dangerous than the

⁵¹ In a case decided before *Armstrong*, *United States v. Aguilar*, 883 F.2d 662, 706 (9th Cir. 1989), *superseded by statute on other grounds*, P.L. No. 99–603, 100 Stat. 3359, as stated in *United States v. Gonzalez–Torres*, 309 F.3d 594 (9th Cir. 2002). 1989), the Ninth Circuit stated that:

The goal of identifying a similarly situated class of law breakers is to isolate the factor allegedly subject to impermissible discrimination. The similarly situated group is the control group. The control group and defendant are the same in all relevant respects, except that defendant was, for instance, exercising his first amendment rights. If all other things are equal, the prosecution of only those persons exercising their constitutional rights gives rise to an inference of discrimination. But where the comparison group has less in common with defendant, then factors other than the protected expression may very well play a part in the prosecution.

single sale of cocaine by individuals.”⁵² *Cf. Tuitt*, 68 F.Supp.2d at 14 (noting that the government was defining “similarly situated” too narrowly as “similarly situated” does not mean “identically situated”). Other Circuits have defined “similarly situated” as follows.

i. First Circuit

The First Circuit defines similarly situated as: “A similarly situated offender is one outside the protected class who has committed roughly the same crime under roughly the same circumstances but against whom the law has not been enforced.” *United States v. Lewis*, 517 F.3d 20, 25 (1st Cir. 2008). The First Circuit also explained that:

In configuring the pool of similarly situated offenders, ‘no fact should be omitted to make it out completely.’ To be sure, this statement cannot be taken literally. The focus of an inquiring court must be on factors that are at least arguably material to the decision as to whether or not to prosecute. Material prosecutorial factors are those that are relevant—that is, that have some meaningful relationship either to the charges at issue or to the accused—and that might be considered by a reasonable prosecutor. Unrelated, irrelevant, or trivial factors cannot meet the materiality requirement and, therefore, cannot be built into the configuration of the pool.

Id. (citing *Armstrong*, 517 U.S. at 466).

ii. Fourth Circuit

The Fourth Circuit defines similarly situated as: “Defendants are similarly situated when their circumstances present no distinguishable legitimate prosecutorial factors that might justify making different prosecutorial decisions with respect to them.” *Olvis*, 97 F.3d at 744. *Cf. Chavez*, 251 F.3d at 636 (“The relevant inquiry is whether a similarly situated individual was treated differently than the plaintiff, not whether one white motorist was subjected to the same

⁵² All of the cases in Operation Safe School concern the single sale of a controlled substance by an individual. Notice of Related Case at 5, *United States v. Tiana Reddic*, No. 15cr52 (N.D. Cal. filed Mar. 31, 2015) (Docket No. 16-2).

The Fourth Circuit also identified the following factors as relevant to the issue of whether someone is similarly situated: (1) a prosecutor’s decision to offer immunity to an equally culpable defendant because that defendant may choose to cooperate and expose more criminal activity; (2) the strength of the evidence against a particular defendant; (3) the defendant’s role in the crime; (4) whether the defendant is being prosecuted by state authorities; (5) the defendant’s candor and willingness to plead guilty; (6) the amount of resources required to convict a defendant; (7) the extent of prosecutorial resources; (8) the potential impact of a prosecution on related investigations and prosecutions; and (9) prosecutorial priorities for addressing specific types of illegal conduct.” *Olvis*, 97 F.3d at 744. The 6th through 9th factors relate to whether the same law enforcement officers were involved. *See Venable*, 666 F.3d at 902 (noting that factors 6-9 are “are all affected by Project Exile’s role in this case,” and that “it bears note that in order to prosecute Turner and Zechman, the United States Attorney’s Office for the Eastern District of Virginia would have had to reach outside the Project Exile referral process, outside the geographic reach of Project Exile, and outside its own district”).

Under Seventh Circuit law, the “similarly situated” comparison group is defined by the government’s purported selection criteria. In *United States v. Hayes*, 236 F.3d 891 (7th Cir. 2001), for example, the court focused on comparing “African-Americans falling within the Operation Triggerlock guidelines [who] were prosecuted in federal court” to “persons of another race who fell within the Operation Triggerlock guidelines and were not federally prosecuted.” *Id.* at 895–896 (7th Cir. 2001); *see also Chavez*, 251 F.3d at 640-45 (defining similarly situated comparison group as white drivers on Illinois highways who met the requirements of law

Page 219 of 314

enforcement's "Operation Valkyrie").

iv. Eleventh Circuit

The Eleventh Circuit defines similarly situated as:

In light of those legitimate factors, we define a "similarly situated" person for selective prosecution purposes as one who engaged in the same type of conduct, which means that the comparator committed the same basic crime in substantially the same manner as the defendant—so that any prosecution of that individual would have the same deterrence value and would be related in the same way to the Government's enforcement priorities and enforcement plan—and against whom the evidence was as strong or stronger than that against the defendant.

United States v. Smith, 231 F.3d 800, 810 (11th Cir. 2000).

In addressing "similarly situated," the Eleventh Circuit also noted that though the Supreme Court has not "definitively explained what constitutes a 'similarly situated' individual in this context, [] the definition is informed by the Supreme Court's recognition of legitimate factors that may motivate a prosecutor's decision to bring a case against a particular defendant. Those factors include 'the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan.'" *Id.* at 810 (citing *Armstrong*, 517 U.S. at 465). Finally, the Eleventh Circuit explained that the "government can legitimately place a higher priority on prosecuting someone who commits an offense three, six or seven times, than someone who commits an offense once or twice, especially when the offense is a non-violent one. Likewise, the willingness of a jury to convict a defendant of a crime may increase with the number of times that defendant has committed the crime." *Id.* at 812.

b. The Defendants Have Made A Prima Facie Showing Of Discriminatory Effect

As an initial matter, this Court need not select a specific definition of a "similarly situated" individual because, under any definition used by any court, the defense has identified

1 numerous similarly situated individuals who could have been charged in Operation Safe Schools
 2 but were not. Indeed, the evidence of Operation Safe Schools' discriminatory effect is
 3 overwhelming.

4 First, the expert report prepared by Dr. Beckett compellingly demonstrates that the racial
 5 composition of persons charged with drug-trafficking under Operation Safe Schools (100%
 6 Black) is significantly at odds with both (a) the racial composition of Tenderloin-based drug-
 7 traffickers arrested and charged in San Francisco County Superior Court; and (b) the racial
 8 composition of drug providers in the Tenderloin as described by drug users in the Tenderloin.
 9 See Ex. 41, Amram Disco. Mtn. Decl., Att. M. As Dr. Beckett found, during the relevant time
 10 period, 61.4% of those arrested in the Tenderloin and charged with drug-trafficking crimes in
 11 Superior Court were Black, while 24.7% were Latino and 10.7% were White. *Id.* at Ex.04218-
 12 20. According to Dr. Beckett, when compared to the 100% Black arrest/charging rate of
 13 Operation Safe Schools, the difference in these racial proportions is "highly statistically
 14 significant, and there is virtually no chance that this difference is the result of chance."⁵³ *Id.* at
 15 Ex.04219-20. A comparison between Operation Safe Schools and Dr. Beckett's study of the
 16 racial composition of drug providers in the Tenderloin (56% Black, 20% Latino, 16.8% White)
 17 leads to the same conclusion. *Id.* at Ex.04220.

18 Next, almost every area of the Tenderloin falls within 1,000 feet of a playground or
 19 educational institution covered by 21 U.S.C. § 860, the statute under which the Operation Safe
 20 Schools defendants were prosecuted.⁵⁴ See Ex.6, Sommerfeld Disco. Mtn. Decl. ¶ 10 & Att. D;

21 ⁵³ In addition to the CMS data, the defense has identified more than fifty non-Black drug
 22 traffickers who were arrested in the Tenderloin between August-December 2013 and August-
 23 December 2014, but were not charged in either state or federal court. See Ex. 1, Koeninger
 Disco. Mtn. Decl., Att. A-B; *cf. id.* Att. G. There is good reason to believe that additional public
 records requests would reveal even more such arrests. See n.16 *supra*.

24 ⁵⁴ As noted above, the Operation Safe Schools defendants were indicted under various provisions
 25 of § 860. While many were indicted for activity within 1,000 feet of a school, one defendant
 26 (Lakeysha White) was charged with drug-trafficking within 1,000 feet of a playground, while
 another (William Brown) was charged with drug-trafficking within 1,000 feet of the Downtown
 Campus of San Francisco State University.

27
 28 NOTICE OF MOTION AND MOTION TO COMPEL DISCOVERY ON SELECTIVE PROSECUTION AND
 ENFORCEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION
 CASE NO. CR 14-643 EMC

Ex. 38, Declaration of Loana Dominguez in Support of Motion to Compel Discovery on Selective Prosecution and Enforcement ¶¶ 2-4 at Ex.03073-75. Accordingly, of the hundreds of drug-trafficking arrests that were made in the Tenderloin between January 2013 and February 2015 and involved non-Black individuals, almost *all* could have been charged under § 860.⁵⁵ See Ex. 1, Koeninger Disco. Mtn. Decl., Atts. B & G (listing hundreds of non-Black drug-trafficking arrests in the Tenderloin); *id.*, Att. A (incident reports underlying various Tenderloin arrests of non-Black drug-traffickers). In fact, in multiple instances involving similarly situated, non-Black drug-traffickers, the SFPD officers were actually investigating whether a particular drug transaction occurred less than 1,000 feet from a school. See discussion *supra* at Section V.

Finally, the defense has specifically identified numerous non-Black individuals who were trafficking the same types of drugs as the Operation Safe Schools defendants, during the same or similar time period as the Operation Safe Schools defendants, and whose criminal histories are the same or similar to the Operation Safe Schools defendants (some of whom have **no** adult convictions, **one** misdemeanor, non-drug-related adult conviction, or only **one** drug-trafficking conviction). See Ex. 1, Koeninger Disco. Mtn. Decl., Att. A-D, F-G.⁵⁶ Further, many of these non-Black individuals identified by the defense would constitute “recidivists” or “repeat offenders” under nearly any definition the government could possibly seek to employ. Because numerous examples of these similarly situated non-Black, Tenderloin-based drug-traffickers are discussed in detail in the Background Section V *supra*, the defense will not revisit those facts again here. However, the defense emphasizes that those non-Black, Tenderloin-based drug-traffickers include people who: were arrested while on parole or felony probation for previous

⁵⁵ The defense has identified two non-Black individuals charged in Superior Court whose arrests appear to fall more than 1,000-feet from a covered playground or educational institution. See Ex. 1, Koeninger Disco. Mtn. Decl., Att. G at Ex.02212 (██████████ arrest at Mission and Julia Streets); *id.* at Ex.02220 (██████████ arrest at 8th and Minna Streets).

⁵⁶ By identifying these individuals, the defense does not concede that someone must meet all of these criteria to qualify as similarly situated. In fact, the defense believes that such a ruling would define similarly-situated too narrowly. However, given the volume of “similarly situated” persons identified by the defense, the Court need not decide the precise contours of that phrase.

1 drug-trafficking convictions; otherwise had previous drug-trafficking convictions or charges; had
 2 been repeatedly arrested by SFPD for drug trafficking in the Tenderloin; had open drug-
 3 trafficking cases in S.F. Superior Court; or were otherwise well-known to SFPD as notorious
 4 drug traffickers, some of whom could be found in the Tenderloin almost every day. Moreover,
 5 because some of the defendants targeted by Operation Safe Schools had little-to-no adult
 6 criminal history, *see* Background section I.G *supra*, the defense contends that every non-Black
 7 individual who was arrested for trafficking drugs in the Tenderloin during the relevant time
 8 period constitutes a person similarly situated to the Operation Safe Schools defendants. *See* Ex.
 9 1, Koeninger Disco. Mtn. Decl. Atts. A-D, F-G.

10 In view of the foregoing, the discriminatory effect of Operation Safe Schools is beyond
 11 cavil.

12 **3. Discriminatory Intent Prong Of A Selective Prosecution Claim**

13
 14 Because “[p]roving the motivation behind official action is often a problematic
 15 undertaking,” *Hunter v. Underwood*, 471 U.S. 222 (1995), “[d]etermining whether official action
 16 was motivated by intentional discrimination ‘demands a sensitive inquiry into such
 17 circumstantial and direct evidence of intent as may be available.’” *Farm Labor Organizing*
 18 *Committee v. Ohio State Highway Patrol*, 308 F.3d 523, 534 (6th Cir. 2003) (citing *Village of*
 19 *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)); *United States v.*
 20 *Alcaraz-Arellano*, 441 F.3d 1252, 1264 (10th Cir. 2006) (“Discriminatory intent can be shown
 21 by either direct or circumstantial evidence.”). Courts often look to the use of racially derogatory
 22 language. “Such language is strong evidence of racial animus, an essential element of any equal
 23 protection claim.” *Chavez*, 251 F.3d at 646. *See also Carrasca v. Pomeroy*, 313 F.3d 828, 834
 24 (3d Cir. 2002) (reference to Plaintiffs as “Mexicans,” arguably stated as a pejorative racial slur,
 25 demonstrates that the Rangers acted with a racially discriminatory purpose).

26 Moreover, courts must take into account whether the selection criteria used by the

1 government was subject to abuse or otherwise not neutral. *Wayte v. United States*, 470 U.S. 598,
 2 626 (1985). *See also id.* at 629 (“Adherence to a particular policy or practice, with full
 3 knowledge of the predictable effects of such adherence ... is one factor among others which may
 4 be considered by a court in determining whether a decision was based on an impermissible
 5 ground.”) (internal citations omitted). The Seventh Circuit has explained that a defendant can
 6 satisfy the discriminatory intent prong by coming forward with evidence showing that the
 7 government had an “actual or de facto” policy “encouraging racial profiling.” *United States v.*
 8 *Barlow*, 310 F.3d 1007, 1012 (7th Cir. 2002). And the conduct of police officers, including their
 9 awareness of a defendant’s race before arrest, is relevant. *See Duque-Nava*, 315 F.Supp.2d at
 10 1161 (finding no discriminatory intent where there was no evidence the officer had treated,
 11 spoke to, or otherwise exhibited discriminatory behavior and where there was no evidence the
 12 officer knew the defendant’s race before the stop); *Marshall v. Columbia Lea Regional Hospital*,
 13 345 F.3d 1157, 1168 (10th Cir. 2003) (“Similarly, a police officer’s pattern of traffic stops and
 14 arrests, his questions and statements to the person involved, and other relevant circumstances
 15 may support an inference of discriminatory purpose in this context”).

16 Some courts find that statistics, if compelling, provide sufficient evidence of intent, and
 17 thus the discriminatory intent prong often overlaps with discriminatory effect. *United States v.*
 18 *Alameh*, 341 F.3d 167, 173 (2d Cir. 2003) (“Such purpose may, however, be demonstrated
 19 through circumstantial or statistical evidence.”); *United States v. Paxton*, No. 13 CR 103, 2014
 20 WL 1648746, at *5 (N.D. Ill. Apr. 17, 2014) (finding that statistical data on the races of
 21 defendants charged in phony-stash cases in the Northern District of Illinois was sufficient to
 22 show both discriminatory effect and intent); *Smith*, 231 F.3d at 810 (“We recognize that the
 23 nature of the two prongs of a selective prosecution showing are such that they will often overlap
 24 to some extent....”); *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 n. 20 (1977)
 25 (“Statistics showing racial or ethnic imbalance are probative ... because such imbalance is often a
 26 telltale sign of purposeful discrimination.”); *Tuitt*, 68 F.Supp.2d at 10 (citing *Gomillion v.*

1 *Lightfoot*, 364 U.S. 339, (1960) (“A discriminatory effect which is severe enough can provide
 2 sufficient evidence of discriminatory purpose.”). *See also Washington v. Davis*, 426 U.S. 229,
 3 242 (1976) (“[A]n invidious discriminatory purpose may often be inferred from the totality of the
 4 relevant facts, including the fact, if it is true, that the [practice] bears more heavily on one race
 5 than another.”). This is especially true in cases involving the “inexorable zero.” *See United*
 6 *States v. Paxton*, No. 13 CR 103, 2014 WL 1648746, at *5 (finding that defendants had
 7 presented evidence of discriminatory effect and intent where “[t]he defense has demonstrated
 8 that no white defendants have been indicted for phony stash house cases since 2009, despite the
 9 diverse makeup of the Northern District of Illinois. Because ‘the inexorable zero’ may be
 10 evidence of discriminatory intent, *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886), the court
 11 finds that defendants have produced ‘some evidence’ tending to show discriminatory intent.”).

12 In fact, in the oral argument for *Armstrong*, the Solicitor General conceded that a large
 13 enough statistical disparity between the race of those charged in state court with those charged in
 14 federal court would itself be sufficient to warrant a response from the government. *United States*
 15 *v. Armstrong*, No. 950157, 1996 WL 88550, at *7 (Oral.Arg.Trans., Feb. 26, 1996).
 16 Specifically, Justice Stevens questioned the Solicitor General as to whether discovery would be
 17 warranted if the state court files showed that 50 percent of the prosecutions were of Blacks
 18 whereas 100 percent of the federal prosecutions were of Blacks. *United States v. Armstrong*,
 19 1996 WL 88550, at *3 (U.S.Oral.Arg.1996). After some back and forth, Justice Ginsburg
 20 returned to the question originally posed by Justice Stevens; the Solicitor General responded as
 21 follows: “Well, I think that the example that Justice Stevens gave, and you gave, would be going
 22 a very long way toward showing that there was a selection. There would be people similarly
 23 situated. At least presumably that would require the Government to say something in response to
 24 that, but we certainly don’t have that in this case.... We think in a situation such as you describe
 25 the Government would have a responsibility to come forward and show, in some fashion or
 26 another, that there was an absence of comparability....” *Id.* at *7.

1 Other courts have also found statistics sufficient. In *Tuitt*, for example, the court found
 2 the defense made a sufficient showing to obtain discovery based only on the statistical disparity
 3 between the race of defendants charged in federal court with selling crack cocaine (all Black)
 4 and those charged in state court (57% Black). In so holding, the court noted that the “evidence
 5 more than speaks for itself,” that even the government acknowledged “that the evidence could
 6 ‘raise an eyebrow,’” and that “more importantly, the information provided by Defendant, unlike
 7 that provided in *Armstrong*, is not anecdotal or confined to statistics arising out of the federal
 8 district itself. Rather, Defendant has also undertaken a comprehensive survey of the local state
 9 courts in order to provide an appropriate comparison.” *Tuitt*, 68 F.Supp.2d at 9.

10 In contrast, in *Olvis*, the Fourth Circuit held that the defendant’s statistics did not provide
 11 “some evidence” of discriminatory intent because “the study provide[d] no statistical evidence
 12 on the number of blacks who were actually committing crack cocaine offenses or whether a
 13 greater percentage of whites could have been prosecuted for such crimes.” *Olvis*, 97 F.3d at 745.
 14 “Without an appropriate basis for comparison, the percentage of African American crack cocaine
 15 defendants proved nothing, unless it could be presumed that crack cocaine violations were
 16 committed proportionately by all races, an assumption rejected by the Supreme Court in
 17 *Armstrong*.” *Venable*, 666 F.3d at 903. *See also id.* (finding insufficient evidence of
 18 discriminatory intent because the statistical evidence provided “contains no appropriate basis for
 19 comparison. It provides no statistical evidence about the number of blacks who were actually
 20 committing firearms offenses or whether a greater percentage of whites could have been
 21 prosecuted for such crimes. It does not even provide any evidence regarding the proportion of
 22 blacks residing within the relevant geographical area”).

23 In *Marshall*, the Tenth Circuit approved the use of statistics because:

24
 25 In general, the absence of an overtly discriminatory policy or of direct evidence
 26 of police motivation results in most claims being based on statistical comparisons
 27 between the number of black or other minority Americans stopped or arrested and
 28 their percentage in some measure of the relevant population. This requires a

reliable measure of the demographics of the relevant population, a means of telling whether the data represent similarly situated individuals, and a point of comparison to the actual incidence of crime among different racial or ethnic segments of the population.

345 F.3d at 1168 (citing *Armstrong*, 517 U.S. at 469-70).

a. The Defense Has Shown A Prima Facie Case Of Discriminatory Intent

The statistical disparity present here is so dramatic that it alone should suffice for making a prima facie case of discriminatory intent based on the cases cited above. However, the Court need not decide whether statistics alone are sufficient because there are at least two other bases supporting a prima facie case of discriminatory intent. They are:

- A comparative analysis of the thirty-seven Operation Safe Schools defendants with the similarly-situated persons shows that the government's race neutral reasons for prosecuting the thirty-seven Operation Safe Schools defendants, outlined in their declarations filed in July 2015, are pretextual. *See Batson v. Kentucky*, 476 U.S. 79 (1986); *Crittenden v. Ayers*, 624 F.3d 943, 956 (9th Cir. 2010). ("Comparative juror analysis is an established tool at step three of the Batson analysis for determining whether facially race-neutral reasons are a pretext for discrimination ... comparative juror analysis may be employed at step one to determine whether the petitioner has established a prima facie case of discrimination.").
- The government put in place a policy for charging decisions for Operations Safe Schools that was subject to abuse. *Casteneda v. Partida*, 430 U.S. 482, 494 (1977) (stating a "procedure that is susceptible to abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing").

i. Comparative analysis.

The government has stated that, in implementing Operation Safe Schools, it directed law enforcement to "target recidivist, repeat offenders who were selling drugs near schools and to concentrate on the criminal history of the defendants." Mtn. Seeking Ruling at 6:20-22. The government also said that "the decision to charge each defendant in Operation Safe Schools was

1 based on the nature and number of the defendant’s prior offenses, the proximity of the
 2 defendant’s drug sales to a school, the number of times each defendant sold drugs in and around
 3 the Tenderloin, and the strength of the evidence against each defendant.” Mtn. Seeking Ruling at
 4 7:8-11. However, a critical review of these stated directives shows that they are invalid (and,
 5 therefore, pretextual) – both because the thirty-seven defendants charged in Operation Safe
 6 Schools include individuals who do *not* meet the stated criteria, and because the various non-
 7 Black, Tenderloin-based drug traffickers identified above were not charged even though they *do*
 8 meet the government’s stated criteria.

9 When evaluating Equal Protection Clause claims in the context of a prosecutor’s decision
 10 to strike a prospective juror – *i.e.*, that a prosecutor struck a juror on account of their race – both
 11 the Supreme Court and the Ninth Circuit have consistently endorsed a comparative analysis to
 12 evaluate whether a prosecutor’s facially race-neutral explanation for his or her actions actually
 13 amounted to pretext, and therefore, evidence supporting a finding of purposeful discrimination.
 14 *See, e.g., Miller-El v. Dretke*, 545 U.S. 231, 241 (2005) (“More powerful than these bare
 15 statistics, however, are side-by-side comparisons of some black venire panelists who were struck
 16 and white panelists allowed to serve. If a prosecutor’s proffered reason for striking a black
 17 panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is
 18 evidence tending to prove purposeful discrimination to be considered at *Batson*’s third step.”);
 19 *Crittenden v. Chappell*, 804 F.3d 998, 1012 (9th Cir. 2015) (observing that “[c]omparative juror
 20 analysis is an established tool at step three of the *Batson* analysis for determining whether
 21 facially race-neutral reasons are a pretext for discrimination” and concluding that because non-
 22 Black jurors who were “comparable in their death penalty views and otherwise” to a stricken
 23 Black juror “were selected for the jury, the comparative juror analysis significantly weakens the
 24 government’s race-neutral explanation” for the prosecutor’s challenge and constitutes “strong
 25 evidence in support” of a finding that the challenge “was substantially motivated by race”).⁵⁷

26 ⁵⁷ In *Armstrong*, respondents argued that *Batson* cut against any absolute requirement that
 27

1 The comparative analysis employed by courts to evaluate *Batson*-type claims under the Equal
 2 Protection Clause is instructive in the context of selective-prosecution-based equal protection
 3 claims, and such a comparative analysis finds ready application here. Indeed, when subjected to
 4 comparative analysis, the government's claim that Operation Safe Schools targeted "persistent,
 5 recidivist, and repeat offenders selling drugs near schools in the Tenderloin neighborhood of San
 6 Francisco," Gov't Mtn. Seeking Ruling at 7:10-11, appears to be pretextual.

7
 8 (a) Recidivism

9 The government's assertion that Operation Safe Schools targeted "persistent, recidivist,
 10 and repeat offenders" does not withstand scrutiny under a comparative analysis of all of the
 11 thirty-seven Black defendants charged under the Operation. As discussed *supra* at Background
 12 Section I.G, the criminal history of the thirty-seven defendants varied significantly. In fact, not
 13 all of them were "persistent, recidivist, and repeat offenders." Rather, Jahnaï Carter has no adult
 14 criminal convictions; Darlene Rouse has one adult conviction (for misdemeanor petty theft);
 15 William Brown and Ashley Pharr have only one prior drug-trafficking conviction (from another
 16 county); Matthew Mumphrey has only one prior drug-trafficking conviction, but it is thirteen
 17 years old, and his only other conviction is an eight-year-old drug paraphernalia conviction;
 18 Darrell Powell has no criminal history of drug trafficking; Jamella Jules falls within Criminal
 19 History Category (CHC) II of the U.S. Sentencing Guidelines, with only one prior drug
 20 trafficking conviction from 2002; Shavon Gibson is CHC I, with only one prior conviction of
 21 any kind, a drug-trafficking conviction from 2005; and Shaneka Clay is CHC II based on one

22 defendants must show that similarly-situated people were not prosecuted. *Armstrong*, 517 U.S.
 23 at 467. The Supreme Court held that *Batson* did not do away with the similarly-situated
 24 requirement. That does not mean, however, that *Batson* is not instructive on the issue of whether
 25 a prosecutor's facially race-neutral explanation for a particular decision is a pretext for
 26 discrimination. The Supreme Court has not addressed whether a comparative-juror-analysis
 framework is applicable in the context of a selective prosecution claim when a defendant has
 presented evidence of similarly situated people (as opposed to using comparative juror analysis
 alone to avoid a showing of similarly-situated individuals).

1 prior drug-trafficking conviction from 2002 (a 1998 conviction was too old to count). Ex. 41,
 2 Amram Disco. Mtn. Decl., ¶¶ 2-4, Att. A at Ex.03094-04144; Ex. 2, Ultan Disco. Mtn. Decl., ¶
 3 2, Att. A at Ex.02234-43.

4 While it may be true that other defendants charged under Operation Safe Schools could
 5 fairly be described as “persistent, recidivist, and repeat offenders,” the fact that the government
 6 nevertheless charged individuals who do not fairly meet these criteria “significantly weakens the
 7 government’s race-neutral explanation” for why all of the thirty-seven defendants it charged
 8 under Operation Safe Schools are Black. *Crittenden*, 804 F.3d at 1017.

9 Moreover, many of the non-Black, Tenderloin-based drug traffickers identified by the
 10 defense could fairly be characterized as “persistent, recidivist, and repeat offenders” who were
 11 similarly trafficking drugs in the Tenderloin. *See* discussion *supra*. That none of these non-
 12 Black drug-traffickers were prosecuted under Operation Safe Schools tends to undermine the
 13 government’s assertion that recidivism was a “priority” for deciding whom to prosecute. Indeed,
 14 although the declarations submitted by the government assert that the DEA and SFPD were
 15 instructed to target “persistent, recidivist, and repeat offenders selling drugs near schools in the
 16 Tenderloin neighborhood of San Francisco,” see [Barry Decl. ¶ 7, Docket 51-3; Kelaba Decl. ¶
 17 6, Docket 51-4], and also assert (in various forms) that race was not considered during the
 18 determination of which individuals to prosecute under Operation Safe Schools, it appears that
 19 none of the AUSAs who submitted declarations were willing to state unequivocally that only
 20 Black individuals were arrested and presented for prosecution by the DEA and/or SFPD. In
 21 other words, none of the government’s declarations deny that non-Black drug-traffickers were
 22 arrested by the DEA/SFPD and presented for federal prosecution under Operation Safe Schools –
 23 but nevertheless were not prosecuted because they did not satisfy the Operation’s priorities.

24 (b) Trafficking Drugs Near “Schools”

25 The government also asserts that Operation Safe Schools targeted repeat offenders
 26
 27

“selling drugs near *schools* in the Tenderloin neighborhood of San Francisco.” Gov’t Mtn. Seeking Ruling at 7:10-11 (emphasis added). Although this would constitute a race-neutral basis for prosecution, a comparative analysis also undermines this assertion and suggests that it is pretextual. Significantly, while the Operation purportedly targeted persons selling drugs “near schools” in the Tenderloin, and even though a press-release from the USAO stated that a goal of Operation Safe Schools was “to ensure that *children* who live and go to school in these neighborhoods are not exposed to crime and drug dealing,”⁵⁸ the government nonetheless indicted one of the Operation Safe Schools defendants – William Brown – for trafficking crack cocaine within 1,000 feet of “the Downtown Campus of San Francisco State University.” Indictment, *United States v. Brown*, Case No. CR-15-00069 (Docket 1). Therefore, when indicting Mr. Brown, the government did not adhere to own stated bases for prosecution (and the defense is unaware of any instance in which the government has claimed that one of the goals of Operation Safe Schools was to protect adult students studying at local colleges).⁵⁹ Accordingly, because a comparative analysis shows that not all Operation Safe Schools defendants were charged consistent with the government’s claimed bases for prosecution, this fact “significantly weakens the government’s race-neutral explanation” for why all of the thirty-seven defendants it charged under Operation Safe Schools are/were Black. *Crittenden*, 804 F.3d at 1017.

The defense also has demonstrated that nearly all of the non-Black drug traffickers arrested in the Tenderloin and charged in Superior Court during the relevant period were also with 1,000 feet of an educational institution or playground covered by 21 U.S.C. § 860. *See Ex.*

⁵⁸ See Phillips Decl. In Support Of Notice Of Related Case (“Phillips Related Case Decl.”), Att. C [2.12.15 USAO Press Release], *United States v. Crystal Anthony*, No. 15cr005 (N.D. Cal. filed 03/31/15) [Docket No. 11].

⁵⁹ Lakeysha White was indicted for trafficking drugs within 1,000 feet of a playground rather than a school. *See Indictment, United States v. White*, Case No. CR-15-00029 (Docket 1). Although the defense acknowledges that Ms. White’s indictment is somewhat more consistent with the government’s stated goal of targeting those persons selling drugs near schools (because children play at playgrounds), this additional lack of symmetry among Operation Schools defendants further supports an inference that this basis for prosecution was pretextual.

6, Sommerfeld Disco. Mtn. Decl. ¶ 10 & Att. D at Ex.02931. When the arrest locations for these non-Black individuals is compared with the locations of the incidents underlying the charges against the thirty-seven Operation Safe Schools Defendants, *cf.* Ex. 6, Sommerfeld Disco. Mtn. Decl. ¶ 9 & Att. C at Ex.02926-30 *with* Ex. 6, Sommerfeld Disco. Mtn. Decl., Atts. E & F at Ex.02932-34, it is plain that the two groups were extensively intermingled. Notwithstanding this comparative similarity, not one non-Black individual was charged federally – a fact that also undermines the assertion that Operation Safe Schools was a race-blind operation targeting only those who dealt drugs near schools.

(c) Strength of the Evidence

The government additionally claims that its charging decisions were based in part on the “strength of the evidence against each defendant”; however, this was a sting operation organized by the DEA/SFPD taskforce, in which the same tactics were used for the 2013 operation, and then one of two tactics used for the 2014 operation. *See supra* at section I(D). The “strength of the evidence” was therefore entirely based on whom the DEA/SFPD chose to target and how they chose to conduct the sting operation. The government has never stated that the DEA/SFPD taskforce targeted any non-Blacks. If it didn’t, the government cannot credibly claim that its law enforcement officers can collect evidence only against Blacks, and that, as a result, because there is only “strong evidence” against a Black person, a prosecutor’s subsequent decision to charge that Black person is race neutral.

ii. Use of a policy susceptible to abuse

If the USAO established policies that permitted racial profiling to occur by law enforcement (or failed to put into place any policies to prevent racial profiling), that is sufficient evidence of discriminatory intent whether or not the prosecutors are themselves motivated by racial animus. *See Wayte*, 470 U.S. at 626 (courts must take into account whether the selection

criteria used by the government was subject to abuse or otherwise not neutral). *See also id.* at 629 (“Adherence to a particular policy or practice, with full knowledge of the predictable effects of such adherence ... is one factor among others which may be considered by a court in determining whether a decision was based on an impermissible ground.”) (internal citations omitted). Courts have recognized, for example, that a policy that is susceptible to abuse or allows for excessive officer discretion can lead a factfinder to conclude that the decision makers were motivated by race. *Casteneda v. Partida*, 430 U.S. 482, 494 (1977) (a “procedure that is susceptible to abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing”); *Rodriguez v. California Highway Patrol*, No. 99cv20895 JF, (N.D. Cal. Aug. 1, 2001) [Docket No. 211] (discussing a policy that permits excessive officer discretion). In fact, in the *Batson* context, the Supreme Court recognized that statistical disparities may raise a presumption of discrimination when the procedure at issue presents “the opportunity for discrimination.” *Batson*, 476 U.S. at 95.

Here, the line AUSAs who brought the cases in the 2014 declare that for each of the cases they brought, they were “provided an account of the individual’s conduct memorialized in a Drug Enforcement Administration Form 6, surveillance video of the drug buys taken by the San Francisco Police Department, and the criminal history of each defendant.” Hawkins Decl., ¶ 5; Farnham Decl., ¶ 5.⁶⁰ In other words, it appears from the declarations that the AUSAs became involved after the DEA/SFPD taskforce had chosen the targets, conducted the operations, and written the report. The AUSAs did not state that they participated in the decision about who should be targeted for Operation Safe Schools. Moreover, the declarations do not claim that the AUSAs ever inquired whether any persons who had not been presented for prosecution met the charging criteria set forth by the USAO. Nor do the declarations state that the AUSAs turned down any persons presented for prosecution by the DEA/SFPD taskforce. Rather, the

⁶⁰ The Government did not provide declarations for the line AUSAs from the 2013 sweep.

1 declarations indicate that once the DEA/SFPD taskforce had completed the operation and a
 2 report was prepared, the AUSA reviewed it to determine whether to prosecute. Such a procedure
 3 is “susceptible to abuse” in that there is no system to insure that the law enforcement actors are
 4 not engaging in racial profiling.

5 The government cannot defend itself by claiming that it was unaware of the similarly-
 6 situated persons identified in this motion. The government has already conceded that the
 7 AUSAs were “familiar[] with the Tenderloin, its residents, and the drug dealing that occurred
 8 there,” at the time they began Operation Safe Schools. *See supra* at I.F. Considering the
 9 overwhelming evidence from multiple sources that the Tenderloin drug-selling population is
 10 racially diverse, that different races control different areas in the Tenderloin, and that Latinos
 11 control the public areas near Hastings Law School, the U.S. post office, and U.N. plaza, it is
 12 inconceivable that a person “familiar with the Tenderloin, its residents, and the drug dealing that
 13 occurred there, could reasonably believe that Blacks are the only race that sells in the Tenderloin.
 14 *See supra*, at sections II, III and IV. As to the government’s claim that the two supervisory
 15 AUSAs were not aware of the race of any defendant before authorizing prosecution, Mtn.
 16 Seeking Ruling at 7:1-6,⁶¹ the rap sheet – and often the police report – state the race of the
 17 defendant. Phillips Related Case Decl., Attachment H; Ex. 41 Amram Disco. Mtn. Decl., Att. A
 18 at Ex.03094-04144. Moreover, Operation Safe Schools consisted of two sweeps – one in 2013
 19 and one in 2014. Once the first fourteen people were arrested and arraigned in the 2013 sweep,
 20 the government must have been aware that they all appeared to be Black. Likewise, once the
 21 defendants for the 2014 sweep were brought into court, the government must also have noticed

22
 23 ⁶¹ AUSA Hasib, who initiated Operation Safe Schools, says he, too, did “not know of the race of
 24 most of the defendants prosecuted in Operation Safe Schools.” *Id.* at 6:18-19. The two line
 25 AUSAs for the 2014 sweep, Sarah Hawkins and Lloyd Farnham, do not claim that they were
 26 unaware of the race of the defendants before prosecuting them. Declaration of Sarah Hawkins In
 27 Support Of United States’ Motion (“Hawkins Decl.”) [Docket No. 51-1]; Declaration of Lloyd
 28 Farnham In Support Of United States’ Motion (“Farnham Decl.”) [Docket No. 51-2].

1 that they appeared to be all Black as well. Finally, the filings in the *Furminger* case show that
 2 the government appears to have received the racist text messages before Fall 2014. *See* Phillips
 3 Related Case Decl., Att. I [Docket No. 247-1 in *United States v. Furminger*, No. 14-102 CRB]
 4 (saying that the government received the messages while investigating the case).

5 Thus, before the 2014 sweep, the government was, or should have been, on notice that: 1)
 6 the drug traffickers in the Tenderloin were racially diverse; 2) all defendants from the 2013
 7 sweep were Black, and 3) that there were issues regarding racism in the SFPD. Considering that
 8 both civil litigants and criminal defendants cannot escape liability by “deliberately shielding
 9 themselves from clear evidence of critical facts that are strongly suggested by the
 10 circumstances,” *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 756 (2011) (applying
 11 the willful blindness doctrine to civil cases), the government cannot avoid responsibility by
 12 claiming that it lacked awareness of facts that should have put it on notice of the need to insure
 13 racial bias was not effecting law enforcement officers’ decisions on whom to present for
 14 prosecution. Yet the government’s declarations do not indicate any such procedures were put in
 15 place – even after the 2013 sweep netted only Black defendants.

17 **II. Selective Enforcement**

18 **A. A Selective Enforcement Claim is Cognizable**

19
 20 In *Whren v. United States*, 517 U.S. 806 (1996), the Supreme Court confirmed that an
 21 officer’s discriminatory motivations for pursuing a course of action can give rise to an Equal
 22 Protection claim, even when there is no Fourth Amendment violation. The “Constitution
 23 prohibits selective enforcement of the law based on considerations such as race. But the
 24 constitutional basis for objecting to intentionally discriminatory application of laws is the Equal
 25 Protection Clause, not the Fourth Amendment.” *Whren*, 517 U.S. at 813. *See also Yick Wo v.*
 26 *Hopkins*, 118 U.S. 356 (1886) (“Though the law itself be fair on its face, and impartial in
 27

1 appearance, yet, if it is applied and administered by public authority with an evil eye and an
 2 unequal hand, so as practically to make unjust and illegal discriminations between persons in
 3 similar circumstances, material to their rights, the denial of equal justice is still within the
 4 prohibition of the constitution.”).⁶²

5 Since the Supreme Court’s decision in *Whren* and *Armstrong*, the defense has not found a
 6 citable decision in which the Ninth Circuit addressed either, in a criminal case, a selective
 7 prosecution claim based solely on the actions of law enforcement, or a selective enforcement
 8 claim.⁶³ The Ninth Circuit has, however, plainly recognized the viability of an Equal Protection
 9 claim based on selective enforcement in the civil rights (§ 1983) context. *Lacey v. Maricopa*
 10 *County*, 693 F.3d 896, 920 (9th Cir. 2012) (en banc) (citing *Armstrong*, 517 U.S. at 465);
 11 *Rosenbaum v. City and County of San Francisco*, 484 F.3d 1142, 1153 (9th Cir. 2007) (citing
 12 *Armstrong*, 517 U.S. at 465). There is no logical reason for why dismissal of a criminal charge
 13 would be the appropriate remedy for an Equal Protection violation caused by the prosecutor, but

14 ⁶² Before the Supreme Court’s rulings in *Armstrong* and *Whren*, the Ninth Circuit held that “the
 15 proper focus in discriminatory prosecution cases is on the ultimate decision-maker.” *United*
 16 *States v. Gomez-Lopez*, 62 F.3d 304, 306 (9th Cir. 1995). Therefore the Ninth Circuit denied
 17 selective prosecution claims when “the ultimate decision to prosecute is several steps removed
 18 from the [] officer,” and [t]here is no evidence that the decision to prosecute [] was made by
 19 anyone other than the USAO” *Id.* (citing *United States v. Erne*, 576 F.2d 212, 216 (9th Cir.
 20 1978; *United States v. Greene*, 698 F.2d 1364 (9th Cir. 1983)). None of these cases addressed a
 21 selective enforcement claim. However, as discussed *supra* at pp. 87-89, if discovery shows that
 22 for Operation Safe Schools, the USAO in effect delegated the decision to prosecute to the law
 enforcement agents (by, for example, not declining anyone presented for prosecution nor
 inquiring who else met the charging criteria but had not been presented for prosecution) then the
 racial bias of the law enforcement officers results in selective prosecution as well as selective
 enforcement. *See United States v. Monsoor*, 77 F.3d 1031, 1035 (7th Cir. 1996) (explaining that
 in the vindictiveness context, the animus of the investigating agency will be imputed to the
 prosecutors if a defendant shows that the agency prevailed upon the prosecutor in making the
 decision to seek an indictment).

23 ⁶³ However, in *Turner*, the Ninth Circuit’s opinion took into account the actions of law
 24 enforcement: “appellees have offered no evidence whatsoever of an intent on the part of the
 25 prosecutors to prosecute them on account of their race, and the prosecutors **and FBI**
 26 **investigators** have under oath denied such motivation. No reason was given by the district court
 to doubt the “background presumption” that United States Attorneys are properly discharging
 their duties, no reason given to doubt the integrity of prosecutors **and investigators** whose
 honesty, good faith, and absence of racial bias are unimpaired by anything in evidence before the
 court.” *Turner*, 104 F.3d at 1185 (emphasis added).

unavailable when caused by law enforcement. Under either circumstance, the defendant's prosecution is the result of an unconstitutional application of the law. *See United States v. Davis*, 793 F.3d 712 (7th Cir. 2015) (en banc) ("If the [law enforcement] agencies do [discriminate], they have violated the Constitution – and the fact that the United States Attorney may have prosecuted every case the agencies presented, or chosen 25% of them in a race-blind lottery, would not matter, since the constitutional problem would have preceded the prosecutor's role and could not be eliminated by the fact that things didn't get worse at a later step.").

Moreover, every other circuit that has addressed a motion to dismiss for selective enforcement has addressed the merits of the claim – no circuit has held that selective enforcement cannot result in dismissal.⁶⁴ *Davis*, 793 F.3d 712; *Gibson v. Superintendent*, 411 F.3d 427, 441 (3d Cir. 2005) ("Whren and Carrasca stand for the proposition that, even though the Fourth Amendment reasonableness standard is not influenced by the subjective intentions of the person making the search or seizure, if a person can demonstrate that he was subjected to selective enforcement in violation of his Equal Protection rights, his conviction will be invalid."); *Alcaraz-Arellano*, 441 F.3d at 1264; *United States v. Barlow*, 310 F.3d 1007, 1012 (7th Cir. 2002); *United States v. Bell*, 86 F.3d 820, 822-23 (8th Cir. 1996); *United States v. James*, 257 F.3d 1173, 1179 (10th Cir. 2011); *See also United States v. Lamar*, 2015 WL 4720282 (S.D.N.Y. Aug. 7, 2015) (motion denied but no argument raised that selective enforcement is not cognizable); *Duque-Nava*, 315 F.Supp.2d at 1152; *Tuitt*, 68 F.Supp.2d at 15 (noting that if "the investigators and police authorities exercised discriminatory intent in Defendant's arrest and/or their referral to the United States Attorney's Office, his selective

⁶⁴ In addition, as the Ninth Circuit recognized in *United States v. Montero-Camargo*, 208 F.3d 1122, 1134 (9th Cir. 2000) (en banc), there have been "significant changes in the law restricting the use of race as a criterion in government decision-making. The use of race and ethnicity for such purposes has been severely limited." *See also id.* at 1135 ("Stops based on race or ethnic appearance send the underlying message to all our citizens that those who are not white are judged by the color of their skin alone. Such stops also send a clear message that those who are not white enjoy a lesser degree of constitutional protection-that they are in effect assumed to be potential criminals first and individuals second.")

prosecution claim may be meritorious even without a showing of the prosecutor's intent when deciding to seek an indictment"); *United States v. Whitfield*, 29 F.Supp.3d 503, 511 (E.D. Pa. 2014); *Marshall*, 345 F.3d at 1167 ("Racially selective law enforcement violates this nation's constitutional values at the most fundamental level; indeed, unequal application of criminal law to white and black persons was one of the central evils addressed by framers of the Fourteenth Amendment."). *Cf. United States v. Hare*, 308 F.Supp.2d 955, 96 n.2 (D. Neb. 2004) (noting that there is no Supreme Court or Eighth Circuit authority for dismissal or suppression for selective enforcement).

It bears noting that a large selective enforcement challenge is currently pending in the Northern District of Illinois regarding the phony-stash-house cases brought by the ATF. The cases have not been consolidated and a number of district judges have issued discovery orders for selective enforcement. One discovery order was appealed to a three-judge panel of the Seventh Circuit and then appealed again to an *en banc* panel. In all courts in which the selective enforcement challenge is pending – the district courts and the Seventh Circuit – the government has not even raised the argument that dismissal is not an appropriate remedy for selective enforcement. *United States v. Paxton*, 2014 WL 1648746 (N.D. Ill., Apr. 17, 2014); *United States v. Brown et al.*, 12-CR-632 (N.D. Ill., Nov. 8, 2013) [Docket No. 171]; *United States v. Alexander*, 2013 WL 6491476 (N.D. Ill. Dec. 10, 2013). In fact, the government's repeated motions for a continuance of the briefing in the *en banc* appeal show that the U.S. Attorney's Office for the Northern District of Illinois consulted with the Solicitor General's Office on the briefing for the selective enforcement challenge, and still no argument was raised that selective enforcement is not a cognizable claim in a criminal case. Government's Motion For Extension of Time Within Which To File A Petition For Rehearing *En Banc*, No. 14-1124, *United States v. Davis*, (7th Cir. Filed 9.15.04) [Docket Nos. 43, 45 and 47].

Nevertheless, the USAO in this District has taken the position that, even where a criminal defendant proves an equal protection violation based on selective enforcement, dismissal of the

indictment is not an appropriate remedy for that constitutional violation. *See* Gov't Mtn. Seeking Ruling at 2-6. Rather, the government claims that the *exclusive* remedy for such a violation is a civil rights action under 42 U.S.C. § 1983. *Id.* at 2. In so doing, the government cites to a Sixth Circuit opinion, *United States v. Nichols*, 512 F.3d 789 (6th Cir. 2008) *overruled on other grounds as recognized in United States v. Buford*, 632 F.3d 264, 269 (6th Cir. 2011).⁶⁵ The government's heavy reliance on *Nichols* is misplaced. Most importantly, the defendant in *Nichols* sought the suppression of evidence based on a racially motivated traffic stop – **not** the dismissal of an indictment. *See id.* at 792-95. Thus, the court in *Nichols* addressed only whether the exclusionary rule was “the proper remedy” for an equal protection violation, *id.* at 794, not whether dismissal of the indictment would be an appropriate remedy when a prosecution is predicated on an equal protection violation. *Nichols*, therefore, is of no moment here. The government's citation to *Hudson v. Michigan*, 547 U.S. 591 (2006), is similarly unavailing, as the Court there was considering the applicability of the exclusionary rule to a Fourth Amendment knock-and-announce violation – not the “intentionally discriminatory application” of the law as discussed in *Whren*, 517 U.S. at 813.

B. Standard for Selective Enforcement⁶⁶

Most courts that have addressed selective enforcement have applied the *Armstrong* standard.⁶⁷ *See Alcaraz-Arellano*, 441 F.3d at 1256; *Farm Labor Org. Comm.*, 308 F.3d at 534,

⁶⁵ The government also cites two district court orders, but those cases simply cite *Nichols* with minimal, if any, analysis. *See United States v. Harmon*, 785 F.Supp.2d 1146, 1170 (D.N.M. 2011); *United States v. Foster*, 2008 WL1927392, at *5 (M.D. Ala. 2008).

⁶⁶ As the Seventh Circuit explained: “Law enforcement has a racially discriminatory effect when members of a protected racial group – in this case African Americans – receive less favorable treatment than nonmembers.” *Barlow*, 310 F.3d at 1010 (holding that to obtain discovery on a selective enforcement claim, defendant had to show that the DEA agents chose not to approach whites to whom he was similarly situated).

⁶⁷ Though the Ninth Circuit has not addressed a selective enforcement claim in a criminal case, it has held in the civil rights context that “[e]nforcement may be shown through a variety of actual or threatened arrests, searches and temporary seizures, citations, and other coercive conduct by the police.” *Lacey*, 693 F.3d at 920.

538, 542; *Marshall*, 345 F.3d at 1167; *Barlow*, 310 F.3d at 1012; *Bell*, 86 F.3d at 822-23; *United States v. Dixon*, 486 F.Supp.2d 40, 44 (D.D.C. 2007). *See also James*, 257 F.3d at 1179 (“While the legal standards for examination of the issue of selective prosecution and enforcement are the same, the factual analysis is distinct. To prove discriminatory effect in a race or ethnicity-based selective prosecution claim, a defendant must make a credible showing that a similarly-situated individual of another race could have been prosecuted for the offense for which the defendant was charged. If such a claim is based on the investigative phase of the prosecution, however, the defendant must instead make a credible showing that a similarly-situated individual of another race could have been, but was not, arrested or referred for federal prosecution for the offense for which the defendant was arrested and referred.”).

However, in *Davis*, an *en banc* panel of the Seventh Circuit decided that the *Armstrong* presumption of regularity does not apply to selective enforcement:

To the extent that Davis and the other six defendants want information about how the United States Attorney has exercised prosecutorial discretion, *Armstrong* is an insuperable obstacle (at least on this record). But the defendants’ principal targets are the ATF and the FBI. They maintain that these agencies offer lucrative-seeming opportunities to black and Hispanic suspects, yet not to those similarly situated in criminal background and interests but of other ethnicity. If the agencies do that, they have violated the Constitution—and the fact that the United States Attorney may have prosecuted every case the agencies presented, or chosen 25% of them in a race-blind lottery, would not matter, since the constitutional problem would have preceded the prosecutor’s role and could not be eliminated by the fact that things didn’t get worse at a later step. *Cf. Connecticut v. Teal*, 457 U.S. 440, (1982) (rejecting a “bottom-line defense” in an employment-discrimination suit).

Agents of the ATF and FBI are not protected by a powerful privilege or covered by a presumption of constitutional behavior. Unlike prosecutors, agents regularly testify in criminal cases, and their credibility may be relentlessly attacked by defense counsel. They also may have to testify in pretrial proceedings, such as hearings on motions to suppress evidence, and again their honesty is open to challenge. Statements that agents make in affidavits for search or arrest warrants may be contested, and the court may need their testimony to decide whether if shorn of untruthful statements the affidavits would have established probable cause. *See Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). Agents may be personally liable for withholding evidence from prosecutors and thus causing violations of the constitutional requirement that

defendants have access to material, exculpatory evidence. *See, e.g., Armstrong v. Daily*, 786 F.3d 529 (7th Cir.2015); *Newsome v. McCabe*, 256 F.3d 747, 752 (7th Cir.2001). Before holding hearings (or civil trials) district judges regularly, and properly, allow discovery into nonprivileged aspects of what agents have said or done. In sum, the sort of considerations that led to the outcome in *Armstrong* do not apply to a contention that agents of the FBI or ATF engaged in racial discrimination when selecting targets for sting operations, or when deciding which suspects to refer for prosecution.

Davis, 793 F.3d at 721.

Two other courts have similarly held that *Armstrong* does not apply to selective enforcement: *Rodriguez v. California Highway Patrol*, 89 F.Supp.2d 1131, 1141 (N.D. Cal. 2000) (the “presumption of regularity” that supports prosecutorial decisions and results in “special deference to the prosecutorial office,” does not apply to selective enforcement); *Duque-Nava*, 315 F.Supp.2d at 1152 (“This case presents no issue of federalism. Nor is the deference accorded to the executive branch’s power to prosecute accorded to law enforcement to the same degree. In the civil context, prosecutors are bestowed with absolute immunity for decisions and actions that are within a prosecutor’s scope of responsibility; law enforcement officers are bestowed with only qualified immunity.”).

C. The Defense Has Established a Prima Facie Case of Selective Enforcement

1. The Defense Has Made a Prima Facie Showing of Discriminatory Effect With Respect to Selective Enforcement

In section I.A.2.(b) above, the defense compellingly demonstrated a prima facie case of discriminatory effect with respect to selective prosecution. For the same reasons articulated there, the defense likewise has shown discriminatory effect with respect to selective enforcement.

2. The Defense Has Made a Prima Facie Case of Discriminatory Intent in Regards to Selective Enforcement

The defense has provided over 30 declarations from community members and Operation Safe School defendants showing explicit racial animus by law enforcement officers involved in Operation Safe Schools against the Operation Safe Schools defendants - including the use of racial slurs (“nigger,” “boy,” “little black bitch”), violence, sexual misconduct and inappropriate searches of Black females by male officers. The defense has also identified the use of racially derogatory language deployed during an Operation Safe Schools undercover operation (“Fucking BM”), and evidence of systemic racial bias, and racial animus, within the SFPD generally.

The defense has provided Declarations from community members, including a law professor and a security guard, attesting to the racial diversity of drug sellers in the Tenderloin and law enforcement’s awareness of it. In addition, the police reports the defense obtained through the public records requests show law enforcement knowledge of hundreds of non-Black drug sellers operating in the Tenderloin. Finally, the defense has provided police reports obtained through public records requests in which SFPD officers says such things as: “I have personally witnessed numerous Hispanic individuals that stand on that street corner for hours at a time ... I have directed Tenderloin officers to focus their attention on the drug dealers on that corner and the officers have made numerous drug arrests there.” Ex. 1, Koeninger Disco. Mtn. Decl., Att. A at Ex.00539.

Though “[p]roving the motivation behind official action is often a problematic undertaking,”⁶⁸ *Hunter*, 471 U.S. at 228, here, the evidence, both direct and circumstantial, of discriminatory intent is overwhelming. *See Village of Arlington Heights*, 429 U.S. at 266, 97 S. Ct. 555, 564, 50 L. Ed. 2d 450 (“Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of

⁶⁸ In fact, the use of racially derogatory language is sufficient - “[s]uch language is strong evidence of racial animus, an essential element of any equal protection claim.” *Chavez*, 251 F.3d at 646. But the defense has provided far more than racial slurs.

intent as may be available.”)⁶⁹

CONCLUSION

The Supreme Court’s rejection of the evidence proffered in *Armstrong* convinced some commentators that the decision renders many meritorious claims of selective prosecution impossible to prove. *See, e.g.,* Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of Armstrong*, 73 Chi. Kent L.Rev. 605, 606 (1998); Melissa L. Jampol, *Goodbye to the Defense of Selective Prosecution*, 87 J.Crim.L. & Crimonology 932 (1997); Note, *Race-Based Selective Prosecution*, 110 Harv.L.Rev. 165 (1996). *See also* Randall Kennedy, RACE CRIME AND THE LAW 357–59 (1997). In this case, the defense has done everything required by every standard established by every Court that has ever addressed either selective prosecution or selective enforcement since *Armstrong*. The defense has identified not just one, but hundreds of similarly-situated persons – and described 42 in detail. The defense has provided evidence of a statistical disparity – between state and federal prosecutions, and between the offender population and the federal targets – that is so vast that “there is virtually no chance that this difference is the result of chance.”⁷⁰ The defense provided dozens of declarations attesting to explicit racial animus by the law enforcement officers involved.

⁶⁹ Moreover, district courts have granted similar discovery requests on lesser showings than the defendants have made here. For example, the Chief Judge in the Northern District of Illinois ordered the Government to provide discovery where “[t]he defendants’ motion has specifically identified 17 phony stash house rip off cases [whose] data shows that the overwhelming targets of these investigations were African Americans [and] none of the defendants ... were nonminorities.” Order Compelling Discovery, *United States v. Antonio Williams et al.*, 12 Cr. 887 (N.D. Ill. July 31, 2013), ECF No. 70; *see also Paxton*, 2014 WL 1648746, at *5 (ordering discovery where “[a]ll of the cases identified by defendants have involved undercover operations by ATF agents in circumstances largely similar to the instant case [and where] the statistics appear to be reliable because they are corroborated, in part, by the lists of cases provided by the government, and there is no assertion that the information collected by defendants as to race is inaccurate”).

⁷⁰ Ex. 41, Amram Disco. Mtn. Decl., Att. M.

1 This evidence, and the prosecutors own declarations, raise serious questions regarding
 2 whether the prosecutors failed in their obligation to put in place policies to insure that racial bias
 3 did not impact law enforcement's decisions on whom to present for prosecution despite knowing
 4 (or being in possession of facts that would obligate one to know) about the problems with racism
 5 in SFPD. As a result, this Court is faced with the strongest prima facie case of selective
 6 prosecution and selective enforcement since the Supreme Court decided *Armstrong*. And this
 7 Court must decide whether the commentators are correct that *Armstrong* makes selective
 8 prosecution impossible to prove or whether, if, as has been done here, a defendant does
 9 everything required by *Armstrong*, she will get discovery and have her claim heard on the merits.

10 11 **DISCOVERY REQUEST**

12 The defense requests the following discovery:

- 13
14 1. A list of all cases prosecuted pursuant to Operation Safe Schools (*see* Phillips Related
15 Case Decl., Att. C [12.09.13 USAO Press Release]; Att. D [2.12.15 USAO Press
16 Release]), and the race of each defendant charged in those cases.
- 17
18 2. A list of all persons who were considered for prosecution pursuant to Operation Safe
19 Schools, but for whom prosecution was declined, and the race of those persons.
- 20
21 3. All writings, records, and/or memorializations setting out the real-time reasons the DEA
22 and/or the SFPD gave for pursuing—or not pursuing— an individual defendant or case in
23 Operation safe Schools.
- 24
25 4. The charging selection criteria for Operation Safe Schools.
- 26
27 5. Issuance of a Rule 17 subpoena to the DEA and the SFPD for the personnel files for all
28 DEA agents and SFPD officers involved in Operation Safe Schools. Or, in the

NOTICE OF MOTION AND MOTION TO COMPEL DISCOVERY ON SELECTIVE PROSECUTION AND
 ENFORCEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION
 CASE NO. CR 14-643 EMC

alternative, the defense will agree that the USAO review the personnel files of all the law enforcement officers involved and disclose any documents discoverable under *Pitchess v. Superior Court*, 11 Cal.3d 531 (1974) and *United States v. Henthorn*, 931 F.2d 29 (9th Cir. 1991), including: all records of any and all complaints; any known history of misconduct as a law enforcement officer; past instances where an officer's veracity or candor has been called into question; formal or informal reprimands from the DEA or SFPD or other known law enforcement agencies; pending or resolved internal investigations and/or substantiated reports of corruption and/or other improper conduct; and any allegations of racial bias (generally) or sexually inappropriate behavior (directed toward Black civilians).

6. Issuance of a Rule 17 subpoena to SFPD for: (a) all Field Interview Cards and incident reports relating to the investigation, arrest or prosecution of narcotics offenses by Tenderloin police station (Company J), Southern Police Station (Company B), Northern Police Station (Company E) and Narcotics Division from January 1, 2013 to August 4, 2015; and (b) rap sheets for any person identified in such Field Interview Cards or incident reports who was investigated, arrested, or prosecuted for a narcotics offense.
7. Rap sheets and SFPD incident reports for all individuals identified in Attachment B to Exhibit 6, Declaration of August Sommerfeld. Rap sheets for all persons identified in Attachment B to Exhibit 1, Declaration of Steven J. Koeninger.
8. Issuance of a Rule 17 subpoena for all incident reports from the 2009 through 2013 Operation Safe Schools initiatives, based in the Tenderloin, by SFPD and the San Francisco District Attorney's Office, as referenced in Attachments G through J to the Amram Discovery Motion Decl. at Ex.04167-76. Rap sheets for any person considered

1 for prosecution pursuant to the Operation Safe Schools initiatives described in this
2 paragraph.

3 9. All documents and communications, including all emails, memos, text messages, press
4 releases, voicemail messages, audio and video recordings, between: (a) any persons
5 employed by the USAO; (b) any persons employed by the DEA; (c) any persons
6 employed by the SFPD; (d) the USAO (and any person employed by the USAO) and the
7 DEA (and any person employed by the DEA); (e) the USAO (and any person employed
8 by the USAO), and the SFPD (and any person employed by the SFPD); and (f) the DEA
9 (and any person employed by the DEA) and the SFPD (and any person employed by the
10 SFPD), related to: the investigation of any individuals pursuant to Operation Safe
11 Schools; the decision to investigate (or not investigate) anyone pursuant to Operation
12 Safe Schools; the charging criteria for Operation Safe Schools; the decision to charge (or
13 not charge) anyone in Operation Safe Schools; the race of any Operation Safe Schools
14 defendant; and the decision to decline charging someone in Operation Safe Schools.
15 Such documents and communications includes those made on personally owned devices
16 and/or personally maintained email accounts or social media accounts.

17
18
19 10. For each Operation Safe Schools case, a statement of the prior criminal investigations, if
20 any, that the DEA and/or SFPD conducted into each defendant before initiating the
21 Operation Safe Schools prosecution.

22
23 11. All SFPD Manuals, circulars, field notes, correspondence, or any other material which
24 discusses Operation Safe Schools including protocols and/or directions to officers and
25 confidential informants regarding how to conduct such operations, how to determine
26 which persons to pursue as potential targets or ultimate defendants, and how to ensure
27

1 that officers are not targeting persons for such operations on the basis of their race, color,
2 ancestry, or national origin.

3 12. All national and California Divisions of the DEA Manuals, circulars, field notes,
4 correspondence, or any other material which discusses Operation Safe Schools including
5 protocols and/or directions to agents and confidential informants regarding how to
6 conduct such operations, how to determine which persons to pursue as potential targets or
7 ultimate defendants, and how to ensure that agents are not targeting persons for such
8 operations on the basis of their race, color, ancestry, or national origin.

9
10 13. All documents containing information on how supervisors and managers of the DEA
11 were to ensure and/or did ensure that their agents were not targeting persons on the basis
12 of their race, color, ancestry, or national origin for these Operation Safe Schools cases,
13 and what actions those supervisors and managers took to determine whether agents were
14 in fact targeting persons for those reasons.

15
16 14. All documents containing information on how supervisors and managers of the SFPD
17 were to ensure and/or did ensure that their officers were not targeting persons on the basis
18 of their race, color, ancestry, or national origin for these Operation Safe Schools cases,
19 and what actions those supervisors and managers took to determine whether officers were
20 in fact targeting persons for those reasons.

21 15. The number of confidential informants that the DEA has used in Operation Safe Schools
22 cases and the number of those confidential informants that had access to non-Black
23 persons who could be targeted for a phony-stash case.

24
25 16. What, if anything, any confidential informant was told about the criteria being used to
26 target individuals for Operation Safe Schools.

27
28 NOTICE OF MOTION AND MOTION TO COMPEL DISCOVERY ON SELECTIVE PROSECUTION AND
ENFORCEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION
CASE NO. CR 14-643 EMC

1 17. The number of confidential informants that the SFPD has used in Operation Safe Schools
2 cases and the number of those confidential informants that had access to non-Black
3 persons who could be targeted for a phony-stash case.

4 18. Discovery from, and other information pertaining, to Operation Safe Schools cases where
5 the USAO, and/or the DEA, and/or the SFPD targeted non-African American persons.

6 19. All documents that contain information about actions taken by the USAO to ensure that
7 defendants in Operation Safe Schools cases brought by the USAO had not been targeted
8 due to their race, color, ancestry, or national origin.
9

10 20. A Rule 17 subpoena to ABC 7 News for any and all footage (including outtakes and
11 unpublished footage) pertaining to Operation Safe Schools, as well as all documents and
12 communications between ABC 7 News and the USAO, the DEA, and/or SFPD regarding
13 Operation Safe Schools. *See* Ex. 41, Amram Disco. Mtn. Decl., Att. Ex.04228.
14
15
16
17
18
19
20
21
22
23
24
25
26
27

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: December 02, 2015

By: /s/ Galia Amram
GALIA AMRAM
Attorney for Defendants Carey, Reed,
Reddic and Rouse

Dated: December 02, 2015

By: /s/ Ellen Leonida
ELLEN LEONIDA
Attorney for Defendants Mumphrey and
Matthews

Dated: December 02, 2015

By: /s/ Candis Mitchell
CANDIS MITCHELL
Attorney for Defendant Adams

Dated: December 02, 2015

By: /s/ Daniel P. Blank
DANIEL P. BLANK
Attorney for Defendants Anthony, Dixon
and McNeal

Dated: December 02, 2015

By: /s/ Randy Sue Pollock
RANDY SUE POLLOCK
Attorney for Defendant Madlock

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

MATTHEW MUMPHREY, *et al.*,

Defendants.

Case No. [14-cr-00643-EMC-1](#)

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION TO COMPEL**

Docket No. 119

In this collection of cases, a group of individuals, all of whom are African American and all who are being prosecuted for relatively low level drug trafficking in the Tenderloin under a program entitled Operation Safe Schools (“OSS”) (collectively, “Defendants”), contend their arrests and prosecution were based on racially selective actions taken by local and federal law enforcement. The issue currently before the Court is not whether racially selective actions were in fact taken, but whether Defendants are entitled to discovery to substantiate their claims of selective enforcement and prosecution.

After reviewing extensive briefing, the Court concludes that the record presented by the parties in connection with this motion contains substantial evidence suggestive of racially selective enforcement by the San Francisco Police Department (“SFPD”) and other federal law enforcement in connection with the conduct of OSS; that evidence is countered by a conspicuously meager rebuttal by the government. Accordingly, the Court concludes Defendants have made sufficient showing entitling them to discovery with respect to the claim of selective enforcement. However, the Court holds that, at least at this juncture, Defendants are not entitled to discovery with respect to their claim of selective prosecution. Defendants’ motion to compel discovery is thus **GRANTED** in part and **DENIED** in part.

I. BACKGROUND

The above-referenced cases arise in the context of Operation Safe Schools (“OSS”). OSS was a program jointly undertaken by the U.S. Attorney’s Office (“USAO”), the Drug Enforcement Administration (“DEA”), and the San Francisco Police Department (“SFPD”).¹ *See United States v. Anthony*, No. CR-15-0005 EMC (Docket No. 11-2) (Phillips (FPD) Decl., Ex. C) (USAO press release, dated 12/9/2013) (USA Haag stating that she has “‘directed my office to work with the DEA and the [SFPD] to aggressively prosecute drug trafficking in areas around Tenderloin schools”). The purpose of OSS “was to aggressively prosecute drug dealers around schools and playgrounds in the Tenderloin district.” Docket No. 51-5 (Hasib (USAO) Decl. ¶ 3).

Two “sweeps” were done pursuant to OSS: one in late 2013 (August to November) and a second in late 2014 (October to December). *See* Defs.’ Ex. 3 (Cruz-Laucirica (FPD) Decl., Att. A) (spreadsheet of OSS cases). For the first sweep, 20 “buy/walk” operations were conducted. Fourteen out of the 20 individuals were prosecuted. *See* Docket No. 146-3 (Dorais (DEA) Decl. ¶ 4). For the second sweep, 23 operations were conducted, and all 23 individuals were prosecuted. *See* Docket No. 146-3 (Atakora (DEA) Decl. ¶ 1). Altogether (*i.e.*, for both sweeps), 37 individuals were prosecuted, more specifically, for violations of 21 U.S.C. §§ 841 and 860.² All 37 individuals are African American.

Currently pending before the Court is a joint motion filed by 12 of the individuals who

¹ According to Defendants, at least 46 law enforcement officers were involved in OSS, 34 being SFPD officers, 1 a Daly City officer, 10 DEA officers, and 1 a U.S. Marshal assigned to the DEA. *See* Mot. at 10. Defendants also claim that at least some of the SFPD officers were cross-designated as federal agents. *See* Mot. at 11. The government does not contest these claims. *See also United States v. Anthony*, No. CR-15-0005 EMC (Docket No. 11-1) (Sommerfeld (FPD) Decl., Att. A) (bar graph showing law enforcement officers involved and number of OSS cases each officer worked on); *United States v. Anthony*, No. CR-15-0005 EMC (Docket No. 42-1) (Nocetti (SFPD) Decl. ¶ 1) (testifying that he has been with the SFPD since 1991 and was assigned to serve as a Task Force Officer with DEA from 2000 until December 2013).

² *See* 21 U.S.C. § 841(a)(1) (providing that “it shall be unlawful for any person knowingly or intentionally – (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance”); *id.* § 860(a) (providing that “[a]ny person who violates [§ 841(a)(1)] by distributing, possessing with intent to distribute, or manufacturing a controlled substance in or on, or within one thousand feet of, the real property comprising a public or private elementary, vocational, or secondary school or a public or private college, junior college, or university, or a playground, or housing facility owned by a public housing authority, or within 100 feet of a public or private youth center, public swimming pool, or video arcade facility, is . . . subject to [certain enhanced punishment]”).

were targeted, arrested, and prosecuted pursuant to OSS. For convenience, these individuals shall hereinafter be referred to collectively as “Defendants.” Defendants seek leave to serve discovery related to two different, but related theories: (1) that law enforcement targeted persons for arrest based on their race (*i.e.*, selective enforcement) and (2) that the prosecutors prosecuted the persons based on their race (*i.e.*, selective prosecution). As indicated by the above, the Court hereby **GRANTS** in part and **DENIES** in part Defendants’ motion to compel.

II. ARMSTRONG

The parties agree that *United States v. Armstrong*, 517 U.S. 456 (1996), provides the governing standard for Defendants’ selective prosecution claim. As for the selective enforcement claim, the parties also agree that *Armstrong* provides at least some general guidance, although Defendants assert that *Armstrong* is not completely controlling given that some of its analysis was specific to the role of a prosecutor which is distinct from the role of law enforcement. Given the significance of *Armstrong*, the Court provides a brief synopsis as to the holding therein.

In *Armstrong*, the defendants were indicted on drug and firearm offenses. They alleged that they were selected for prosecution because of their race (African American) and thus moved for discovery or for dismissal of the indictment. *See id.* at 458-59.

In support of their motion, [the defendants] offered only an affidavit by a “Paralegal Specialist,” employed by the Office of the Federal Public Defender representing one of the [defendants]. The only allegation in the affidavit was that, in every one of the 24 § 841 or § 846 [*i.e.*, drug] cases closed by the office during 1991 [*i.e.*, the year before the defendants were indicted], the defendant was black. Accompanying the affidavit was a “study” listing the 24 defendants, their race, whether they were prosecuted for dealing cocaine as well as crack, and the status of each case.

Id. at 459.

The district court ordered the government to provide discovery. Subsequently, the government moved for reconsideration of the discovery order and submitted evidence for the court’s consideration, including (1) affidavits from the federal and local agents participating in the case, which stated that “race played no role in their investigation”; (2) an affidavit from an AUSA who stated that the decision to prosecute met the general criteria for prosecution because, of, *e.g.*,

1 the amount of cocaine base involved, the criminal histories of the defendants, the strength of the
2 evidence, etc.; and (3) sections of a DEA report which concluded that “‘large-scale, interstate
3 tracking networks controlled by Jamaicans, Haitians, and Black street gangs dominate the
4 manufacture and distribution of crack.’” *Id.* at 460.

5 In turn, the defendants provided additional information to the district court, including (1)
6 an affidavit from one of defense counsel, stating that “an intake coordinator at a drug treatment
7 center had told her that there are ‘an equal number of Caucasian users and dealers to minority
8 users and dealers’”; (2) an affidavit from another criminal defense attorney, stating that “in his
9 experience many nonblacks are prosecuted in state court for crack offenses”; and (3) a newspaper
10 article “reporting that federal ‘crack criminals . . . are being punished far more severely than if
11 they had been caught with powder cocaine, and almost every single one of them is black.’” *Id.* at
12 460-61.

13 The district court denied the government’s motion for reconsideration and then, when the
14 government stated it would not comply with the discovery order, dismissed the case.³ *See id.* at
15 461.

16 The specific issue as presented to the Supreme Court was what showing was necessary
17 “for a defendant to be entitled to *discovery* on a claim that the prosecuting attorney singled him
18 out for prosecution on the basis of his race.” *Id.* at 458 (emphasis added). However, before
19 addressing this issue, the Supreme Court addressed the requirements for a selective prosecution
20 claim. The Court explained first that there is a presumption that the prosecuting attorney has
21 properly discharged his or her official duties and not violated equal protection. This presumption
22 arises from the broad discretion a prosecutor is given in enforcing the criminal laws. *See id.* at
23 464-65 (noting, *e.g.*, that, “[i]n the ordinary case, ‘so long as the prosecutor has probable cause to
24 believe that the accused committed an offense defined by statute, the decision whether or not to
25 prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his
26

27 ³ In a footnote, the Supreme Court noted that it had “never determined whether dismissal of the
28 indictment, or some other sanction, is the proper remedy if a court determines that a defendant has
been the victim of prosecution on the basis of his race.” *Armstrong*, 517 U.S. at 461 n.2.

discretion”). “[T]o dispel that presumption . . . , a criminal defendant must present ‘clear evidence to the contrary.’” *Id.* at 465. More specifically, the defendant must present clear evidence of discriminatory effect and discriminatory purpose. *See id.*

“Having reviewed the requirements to prove a selective-prosecution claim, [the Court] turn[ed] to the showing necessary to obtain discovery in support of such a claim.” *Id.* at 468. According to the Court, “[t]he justifications for a rigorous standard for the elements of a selective prosecution claim . . . require a correspondingly rigorous standard for discovery in aid of such a claim,” especially as discovery “will divert prosecutors’ resources” and “may disclose the Government’s prosecutorial strategy.” *Id.* It distilled the showing required for discovery as follows: there must be “‘some evidence tending to show the existence of the essential elements of the [selective prosecution] defense,’ discriminatory effect and discriminatory intent.” *Id.* (emphasis added).

For purposes of the case at hand, the Supreme Court only had to consider “what evidence constitutes ‘some evidence tending to show the existence’ of the discriminatory effect element.” *Id.* at 469. “The Court of Appeals [had] held that a defendant may establish a colorable basis for discriminatory effect without evidence that the Government has failed to prosecute others who are similarly situated to the defendant.” *Id.* The Supreme Court concluded that the appellate court was “mistaken in this view.” *Id.* It held that there must be “some evidence that similarly situated defendants of other races could have been prosecuted, but were not,” *i.e.*, “some evidence of differential treatment of similarly situated members of other races or protected classes.” *Id.* at 469-70.

The Supreme Court indicated that a similarly situated requirement was necessary in part because one could not assume, as the appellate court did below, that “‘people of *all* races commit *all* types of crimes” – *i.e.*, as opposed to “the premise that any type of crime is the exclusive province of any particular racial or ethnic group.”” *Id.* (emphasis added). The Court noted that not only was there no authority cited for the appellate court’s assumption but also that assumption “seems contradicted by the most recent statistics of the United States Sentencing Commission,” which showed, *e.g.*, that “[m]ore than 90% of the persons sentenced in 1994 for crack cocaine

1 trafficking were black, 93.4% of convicted LSD dealers were white, and 91% of those convicted
2 for pornography or prostitution were white.” *Id.*⁴

3 In response to the concern that the similarly situated requirement would pose an
4 evidentiary obstacle to a defendant, the Supreme Court stated as follows:

5
6 In the present case, if the claim of selective prosecution were well
7 founded, it should not have been an insuperable task to prove that
8 persons of other races were being treated differently than
9 respondents. For example, respondents could have investigated
10 whether similarly situated persons of other races were prosecuted by
11 the State of California and were known to federal law enforcement
12 officers, but were not prosecuted in federal court.

13 *Id.* at 470.⁵

14 Ultimately, the Supreme Court held that, in the case under consideration, the defendants
15 had not satisfied the requirement of “some evidence” of discriminatory effect. Defendants’
16 “study” (*i.e.*, that, in every one of the 24 § 841 or § 846 cases closed by the FPD during 1991, the
17 defendant was black)

18 failed to identify individuals who were not black and could have
19 been prosecuted for the offenses for which responds were charged,
20 but were not so prosecuted. . . . The newspaper article, which
21 discussed the discriminatory effect of the federal drug sentencing
22 laws, was not relevant to an allegation of discrimination in decisions
23 to prosecute. [The] affidavits, which recounted one attorney’s
24 conversation with a drug treatment center employee and the
25 experience of another attorney defending drug prosecutions in state
26 court, recounted hearsay and reported personal conclusions based on
27 anecdotal evidence.

28
⁴ The Court did not address the question-begging nature of these statistics; it is possible that these statistics on conviction and sentencing themselves reflect bias patterns of enforcement and prosecution, not simply the pattern of actual law violations. *See, e.g.*, Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing & Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 Yale L.J. 2 (2013).

⁵ Even though the Supreme Court made reference to whether federal law enforcement *knew* of similarly situated persons being prosecuted in state court, that would seem to be more an issue with respect to discriminatory *intent* rather than discriminatory *effect*. *Cf. United States v. Tuitt*, 68 F. Supp. 2d 4, 10 (D. Mass. 1999) (noting that “the Supreme Court’s actual analysis of the evidence offered in *Armstrong* . . . in some ways appears to conflate the elements of effect and intent”).

1 *Id.*

2 After *Armstrong*, the Supreme Court issued another opinion on selective prosecution. *See*
3 *United States v. Bass*, 536 U.S. 862 (2002) (per curiam). The opinion – very brief – addressed a
4 contention made by a defendant that the government had decided to seek the death penalty against
5 him because of his race. The defendant sought dismissal based on this claim or, in the alternative,
6 discovery about the government’s capital charging practices. *See id.* at 862-63. The Supreme
7 Court concluded that the defendant had failed to “make a ‘credible showing’ that ‘similarly
8 situated individuals of a different race were not [charged],’” as required to demonstrate
9 discriminatory effect. *Id.* at 863.

10
11 The Sixth Circuit concluded that respondent had made such a
12 showing based on nationwide statistics demonstrating that “the
13 United States charges blacks with a death-eligible offense more than
14 twice as often as it charges white” and that the United States enters
15 into plea bargains more frequently with whites than it does with
16 blacks. Even assuming that the *Armstrong* requirement can be
17 satisfied by a nationwide showing (as opposed to a showing
18 regarding the record of the decisionmakers in respondent’s case),
19 raw statistics regarding overall charges say nothing about charges
20 brought against *similarly situated defendants*. . . .

21 *Id.* at 863-64 (emphasis added).⁶

22 In the instant case, both parties agree that *Armstrong* provides the general framework for
23 both selective prosecution and selective enforcement claims – *i.e.*, there must be both a
24 discriminatory effect and a discriminatory purpose. *See, e.g., United States v. Barlow*, 310 F.3d
25 1007, 1010 (7th Cir. 2002) (noting that defendant was “complain[ing] not of selective prosecution,
26 but of racial profiling [by the DEA], a selective law enforcement tactic[,] [b]ut the same analysis
27 governs both types of claims: a defendant seeking discovery on a selective enforcement claim
28 must meet the same ‘ordinary equal protection standards’ that *Armstrong* outlines for selective

⁶ Although the *Armstrong* and *Bass* Courts focused on similarly situated as part of the discriminatory effect analysis, evidence of differential treatment is also probative of discriminatory intent. *See United States v. Smith*, 231 F.3d 800, 809 (11th Cir. 2000) (“recogniz[ing] that the nature of the two prongs of a selective prosecution showing are such that they will often overlap to some extent”); *cf. Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1158 (9th Cir. 2013) (indicating that, in a civil case where discrimination is alleged, preferential treatment of a similarly situated person can be evidence of discriminatory intent).

prosecution claims”). Defendants, argue, however, that the specific discriminatory effect analysis in *Armstrong* applies only to selective prosecution claims, and not selective enforcement claims, because the analysis was targeted to the special role that a prosecutor has. Defendants point out that, in *United States v. Davis*, 793 F.3d 712 (7th Cir. 2015) (en banc), the Seventh Circuit, sitting en banc, acknowledged the distinction between selective enforcement and selective prosecution and found the rationale of *Armstrong* does not apply with full force where prosecutorial discretion is not involved.

In *Davis*, there were seven African American defendants who were charged “with several federal offenses arising from a plan to rob a stash house, where the defendants believed they would find drugs and money.” *Davis*, 793 F.3d at 714. The defendants argued that “the prosecutor, the FBI, and the ATF engaged in racial discrimination” by proceeding against them. *Id.* In support of their claim of discrimination, the defendants informed the district court that, “since 2006[,] the United States Attorney for the Northern District of Illinois has prosecuted 20 stash-house stings, and that of the defendants in these cases 75 were black and 19 white.” *Id.* at 715 (adding that “13 of the 19 white defendants were Hispanic”). The district court permitted discovery because “the overwhelming majority of the defendants named [were] individuals of color.” *Id.* at 719.

The Seventh Circuit disagreed with the district court, stating that its decision was

inconsistent with *Armstrong*. The record in *Armstrong* showed that every defendant in every crack-cocaine prosecution filed by a particular United States Attorney’s office and assigned to the public defender was black. If, as the Supreme Court held, that evidence did not justify discovery into the way the prosecutor selected cases, then proof that in the Northern District of Illinois three-quarters of the defendants in stash-house cases have been black does not suffice.

Id. at 719-20.

But the Seventh Circuit then went on to note that the matter before it was not “that simple” because *Armstrong* was a pure selective prosecution case. *Id.* at 720.

The Supreme Court [noted] that federal prosecutors deserve a strong presumption of honest and constitutional behavior, which cannot be

overcome simply by a racial disproportion in the outcome, for disparate impact differs from discriminatory intent. The Justices also noted that there are good reasons why the Judicial Branch should not attempt to supervise how the Executive Branch exercises prosecutorial discretion. In order to give a measure of protection (and confidentiality) to the Executive Branch's deliberative processes, which are covered by strong privileges, the Court in *Armstrong* insisted that the defendant produce evidence that persons of a different race, but otherwise comparable in criminal behavior, were presented to the United States Attorney for prosecution, but that prosecution was declined.

Id.

The Seventh Circuit then noted that the case before it was not really a selective prosecution case but rather a selective enforcement case – “the defendant’s principal targets are the ATF and the FBI.” *Id.* But

[a]gents of the ATF and FBI are not protected by a powerful privilege or covered by a presumption of constitutional behavior. Unlike prosecutors, agents regularly testify in criminal cases, and their credibility may be relentlessly attacked by defense counsel. They also may have to testify in pretrial proceedings, such as hearings on motions to suppress evidence, and again their honesty is open to challenge. Statements that agents make in affidavits for search or arrest warrants may be contested, and the court may need their testimony to decide whether if shorn of untruthful statements the affidavits would have established probable cause. Before holding hearings (or civil trials) district judges regularly, and properly, allow discovery into nonprivileged aspects of what agents have said or done. In sum, the sort of considerations that led to the outcome in *Armstrong* do not apply to a contention that agents of the FBI or ATF engaged in racial discrimination when selecting targets for sting operations, or when deciding which suspects to refer for prosecution.

Id. at 720-21. *But see United States v. Alcaraz-Arellano*, 441 F.3d 1252, 1264 (10th Cir. 2006) (stating that “[s]imilar caution is required in reviewing a claim of selective law enforcement”).

Although the Court agrees with the reasoning in *Davis*, it need not resolve this issue whether *Armstrong* applies with full force to claims of selective enforcement. The Court finds that, even assuming it does, Defendants have satisfied *Armstrong* in respect to their claim of selective enforcement.

III. RECORD EVIDENCE

Both parties have provided evidence in conjunction with the pending motion. The primary

evidence is briefly outlined below.

A. Defendants' Evidence

- The fact that all 37 OSS defendants are African American.
- Charging data (between January 1, 2013, and February 28, 2015) from the San Francisco Superior Court, more specifically, with respect to drug-trafficking crimes in the Tenderloin. *See* Mot. at 20. The data reflected that 61.4% of those arrested and charged were African American, 24.7% were Latino, and 10.7% were white. *See* Mot. at 21; *see also* 2d Phillips (FPD) Decl., Ex. M (Beckett Rpt. at 7). Defendants' expert, Dr. Beckett, concluded that, based on a comparison of the charging data to the OSS results (where all persons charged were African American), there was a Z score of 4.75. A Z score of 4.75 is highly significant. *See* Amram (FPD) Reply Decl., Att. A (Supp. Beckett Rpt. at Ex. 05248-49). As Defendants explain, and the government does not dispute, a Z score is used to measure the statistical significance of an observed difference. "Z scores with an absolute value of 2 or more are considered statistically significant, meaning that the observed difference is very unlikely to be the result of chance." Mot. at 14 n.24.
- A survey administered to active drug users accessing services at the Tenderloin Needle Exchange site of the San Francisco AIDS Foundation's Needle Exchange Program. The survey commenced in August 2015, *see* Defs.' Ex. 41 (2d Phillips Decl., Ex. M) (Beckett Expert Report at 5), and was conducted on seven consecutive weeks.⁷ *See* Mot. at 14. "In the survey, respondents were asked to recall up to six recent drug transactions that took place in the Tenderloin neighborhood and to identify the race/ethnicity of the person from whom they obtained the drugs." Mot. at 14. The data from the survey reflected as follows: 56% of the Tenderloin drug transactions involved African American drug sellers; 20% involved Latino drug sellers; and 16.8% involved white drug sellers. *See* Mot. at 14. Similar to above Defendants' expert, Dr. Beckett, concluded that, based on a comparison of the survey results to the OSS results, there was a Z score of 5.23. *See* Amram (FPD)

⁷ The government attempts to equate the survey with anecdotal evidence, *see* Opp'n at 21, but that is not a fair criticism given the way that the survey was designed and conducted.

1 Reply Decl., Att. A (Supp. Beckett Rpt. at Ex. 05248-49).

- 2 • Declarations from six persons who work in the Tenderloin. *See* Defs.’ Ex. 25 (Martinez
3 Decl.); Defs.’ Ex. 26 (Sandoval Decl.); Defs.’ Ex. 27 (Brown Decl.); Defs.’ Ex. 28 (Allen
4 Decl.); Defs.’ Ex. 32 (Harkin Decl.); Defs.’ Ex. 36 (Leslie Decl.). The declarations
5 generally indicate that there is a significant presence of non-African American drug dealers
6 in the Tenderloin, particularly in certain locations within the Tenderloin. *See, e.g.*, Defs.’
7 Ex. 32 (Harkin Decl. ¶ 6) (Program Manager for GLIDE Health Services HIV and
8 Hepatitis C programs, stating that “I have found that drug dealers of the same ethnic group
9 tend to work the same areas of the Tenderloin[;] [f]or example, most recently,
10 Leavenworth has Honduran and Mexican drug dealers, Golden Gate Avenue has Whites
11 and African Americans above Jones Street and just African Americans at Jones Street and
12 below, and Hyde Street has Mexicans regularly dealing drugs there”).
- 13 • SFPD incident reports, some of which indicate SFPD “awareness of the presence,
14 behavior, and specific geographic locations frequented by Hispanic/Latino dealers” in the
15 Tenderloin. Mot. at 22 (giving six incident reports as examples). *See, e.g.*, Koeninger
16 (FPD) Decl., Att. D at Ex. 00773 (SFPD incident report, dated April 2013 and authored by
17 Officer G. Darcy) (stating that “I have participated in hundreds of buys busts and
18 surveillance in this area” and that “I know that many of the drug dealers in the Hyde Street
19 area are of Honduran descent”); Koeninger (FPD) Decl., Att. D at Ex. 00736 (SFPD
20 incident report, dated April 2015 and authored by Officer D. Casey) (stating that, “[b]ased
21 off prior arrests and contacts, I know that the corner of Eddy Street and Hyde Street is
22 primarily controlled by Honduran national drug dealers”).
- 23 • Evidence related to approximately sixty non-African American drug dealers who
24 Defendants claim are similarly situated to Defendants. *See* Mot. at 24 *et seq.* (identifying
25 approximately forty such drug dealers); Reply at 14 *et seq.* (adding more comparators).
26 Like Defendants, these sixty or so persons were arrested for committing drug-trafficking
27 crimes in the Tenderloin within the OSS timeframe but, unlike Defendants, were not
28 federally charged under OSS. Some of the OSS officers were involved with the arrests of

some of these individuals. *See* Reply at 37-38. *See, e.g.,* Koeninger (FPD) Decl., Att. A at Ex. 226-3) (SFPD incident report for Doe 6) (reflecting that the following OSS officers were involved in the arrest of Doe 6: Officers MacDonald (involved in 21 OSS cases), Lee (involved in 21 OSS cases), Daggs (involved in 23 OSS cases), Solorzano (involved in 13 OSS cases), Payne (involved in 9 OSS cases), and Hagan (involved in 11 OSS cases)).

- Video from one of the OSS cases (*United States v. McNeal*, No. CR-15-0028 EMC) showing that one officer says, “Fucking BMs” (*i.e.*, black males) and another officer says, “Shh, hey, I’m rolling.” *See* Defs.’ Ex. 5 (1st Phillips (FPD) Decl. ¶¶ 3, 5). The officer who made the first statement was involved in a total of 18 OSS cases; the officer who made the second statement was involved in a total of 11 OSS cases.
- Video from one of the OSS cases (now resolved) (*United States v. Roberts*, No. CR-13-0760 CRB) where the undercover informant declines to buy drugs from an Asian woman and waits to buy drugs from the defendant, an African American woman. *See* Mot. at 60-61; *see also* *United States v. Anthony*, No. CR-15-0005 EMC (Docket No. 11-2) (Phillips (FPD) Decl., Ex. G) (video in *Roberts* case).
- The USAO’s knowledge of problems with racism within the SFPD, at least prior to the second sweep in late 2014 (October to December). Defendants point to the fact that, in early 2014, the USAO indicted three SFPD officers for, *inter alia*, civil rights violations and, prior to trial in November 2014, racist texts were disclosed. (However, none of the officers appears to have been involved with OSS.)
- Declarations from approximately 20-25 OSS defendants (some of the defendants are moving parties, some are not) who describe how SFPD officers have treated African Americans, including but not limited to how they have paid more attention to African Americans than to persons of other races.
 - Some of the OSS defendants talk about negative interactions with officers who were specifically involved with OSS – *e.g.*, (1) Shaughn Ryan (2 OSS cases), *see, e.g.*, Defs.’ Ex. 7 (Nash Decl.); Defs.’ Ex. 9 (McNeal Decl.); Defs.’ Ex. 10 (Jones Decl.); Defs.’ Ex. 14 (Rouse Decl.); Defs.’ Ex. 18 (Williams Decl.); Defs.’ Ex. 19

(Reed Decl.); Defs.' Ex. 20 (Adams Decl.); Defs.' Ex. 21 (Reddic Decl.); Defs.' Ex. 24 (Jules Decl.); Defs.' Ex. 29 (Johnson Decl.); Defs.' Ex. 30 (Cross Decl.); Defs.' Ex. 35 (Wallace Decl.); (2) Darren Nocetti (29 OSS cases), *see, e.g.*, Defs.' Ex. 8 (Mathews Decl.); Defs.' Ex. 37 (Mackey Decl.); (3) Ryan Crosby (11 OSS cases), *see, e.g.*, Defs.' Ex. 12 (Anthony Decl.); Defs.' Ex. 16 (White Decl.); (4) D. Goff (6 OSS cases), *see, e.g.*, Defs.' Ex. 19 (Reed Decl.); Defs.' Ex. 34 (Jackson Decl.); Defs.' Ex. 35 (Wallace Decl.); (5) Anthony Assaretto (8 OSS cases), *see, e.g.*, Defs.' Ex. 34 (Jackson Decl. ¶ 2); (6) Micah Hope (6 OSS cases), *see, e.g.*, Defs.' Ex. 20 (Adams Decl.); and (7) A. Scafani (14 OSS cases), *see, e.g.*, Defs.' Ex. 35 (Wallace Decl.). Some of these interactions, while negative, do not clearly involve race.

- According to some of the defendants, some of the OSS officers (*e.g.*, Shaughn Ryan, Darren Nocetti, Anthony Assaretto, D. Goff, and A. Scafani) have expressly made racist statements or engaged in racist conduct. *See, e.g.*, Defs.' Ex. 7 (Nash Decl. ¶ 5) ("On other occasions, Officer Ryan has referred to African-American females as 'bitches' and has made comments that women who are confidential informants for him are 'bitches that work for me.'"); Defs. Ex. 9 (McNeal Decl. ¶ 5) ("Officer Ryan said a comment to me like, 'I just got married and you better be glad . . . or I'll take some black pussy.'"); Defs.' Ex. 21 (Reddic Decl. ¶ 4) ("On other occasions, Officer Ryan has referred to me as a 'bitch' or 'little black girl.'"); Defs.' Ex. 37 (Mackey Decl. ¶ 3) ("Shortly before my arrest in December, an SFPD officer I know as Darren yelled that I 'better get [my] black ass off the block.'"); Defs.' Ex. 34 (Jackson Decl. ¶ 2) ("On one occasion, I heard Officer Assaretto call an Africa[n]-American man 'nigger.'"); Defs.' Ex. 35 (Wallace Decl. ¶ 7) ("In 2014, I witnessed Officers Goff, Scafani and another [SFPD] Officer harass a small group of African-American teenagers. One of the officers told the group, 'Hands up, don't shoot.' The comment seemed to be intended to make fun of the Black Lives Matter movement.").

- According to some of the female OSS defendants, some of the OSS officers have engaged in sexually inappropriate behavior with them. *See* Mot. at 63-67 (identifying Shaughn Ryan as a particular problem but also pointing to D. Goff and Ryan Crosby). While the incidents are clearly gender based, they are not always clearly race based.

B. Government's Evidence

In its opposition, the government provided declarations from several USAO attorneys and two DEA agents (both supervisors). In these declarations, the attorneys and supervisors deny they considered race or directed anyone to consider race in their management of the OSS. Below is a summary of the evidence the government submitted in support of its position. The declarations submitted by the government have been categorized by sweep.

For the **first OSS sweep**:

- Katie Dorais, Special Agent of the DEA. *See* Pl.'s Ex. 3 (Dorais (DEA) Decl.). Ms. Dorais worked on the first sweep only. Her supervisor in the DEA assigned her as the lead investigator for OSS. According to Ms. Dorais, the investigation "focused on repeat offenders and/or known drug traffickers who were selling drugs near schools in the Tenderloin." Pl.'s Ex. 3 (Dorais (DEA) Decl. ¶ 2). Also according to Ms. Dorais, race was not a consideration: "At no time did I consider race during either phase of [OSS]. In addition, I was not instructed by an [AUSA] to consider race during the investigation [and] I did not direct any law enforcement officer to take race into consideration." Pl.'s Ex. 3 (Dorais (DEA) Decl. ¶ 3). "Between August of 2013 and December of 2013 [the investigatory] team conducted twenty buy/walk Operations." Pl.'s Ex. 3 (Dorais (DEA) Decl. ¶ 4). Ms. Dorais does not explain whether she directly supervised each team member in the field when the arrests were made or whether she delegated the arrest decision to other law enforcement officers, *e.g.*, other DEA officers or SFPD officers. Fourteen out of the 20 persons were arrested and indicted. The remaining 6 were not prosecuted because she and the supervising ASUA (see below) concluded that the evidence was not sufficient for prosecution – *i.e.*, the evidence was not strong enough. *See* Pl.'s Ex.

3 (Dorais (DEA) Decl. ¶ 4). Ms. Dorais does not explain why the evidence was not strong enough. In its brief, however, the government indicates that the evidence was not strong enough because “the videotape did not show the drug deal with sufficient clarity.” Opp’n at 17 n.10; *see also* Pl.’s Ex. 2 (Supp. Hasib (USAO) Decl. ¶ 4). The Court does not have any information about the race of the 6 persons who were not prosecuted.

- Waqar Hasib, AUSA in the USAO. There are technically two declarations from Mr. Hasib, one being submitted as a part of this motion and one that was submitted earlier in the proceedings in conjunction with a different motion. *See* Pl.’s Ex. 1 (Hasib (USAO) Decl.); Pl.’s Ex. 2 (Supp. Hasib (USAO) Decl.). OSS was Mr. Hasib’s idea. *See* Pl.’s Ex. 1 (Hasib (USAO) ¶ 3). According to Mr. Hasib, the purpose of OSS “was to aggressively prosecute drug dealers around schools and playgrounds in the Tenderloin district.” Pl.’s Ex. 1 (Hasib (USAO) Decl. ¶ 3). It appears that Ms. Hasib was the attorney who primarily authorized prosecutions in the first sweep cases.⁸ *See* Pl.’s Ex. 1 (Hasib (USAO) Decl. ¶ 4). (The government did not submit any declarations from the line AUSAs who recommended prosecution to Mr. Hasib.) Mr. Hasib authorized the prosecutions based on the sufficiency of the evidence (each case included a videotaped drug deal) and did not consider race. *See* Pl.’s Ex. 2 (Supp. Hasib (USAO) Decl. ¶ 2). “Indeed, in the large majority of these cases, [he] was entirely unaware of any particular individual’s race when [he] authorized presentation to the grand jury.” Pl.’s Ex. 1 (Hasib (USAO) Decl. ¶ 4). Mr. Hasib did consider the individual’s criminal history prior to authorizing indictment because OSS was intended to “target recidivist, repeat offenders who were selling drugs near schools.” Pl.’s Ex. 1 (Hasib (USAO) Decl. ¶ 6). Mr. Hasib did decline to authorize prosecution on some of the first sweep cases and typically did so “because the video recording did not clearly identify the individual who sold drugs.” Pl.’s Ex. 2 (Supp. Hasib

⁸ Another AUSA, Matthew McCarthy, seems to have authorized prosecution on a handful of OSS cases. *See* Pl.’s Ex. 2 (McCarthy (USAO) Decl. ¶ 2). Like Mr. Hasib, Mr. McCarthy states that race was not a consideration in his decision to commence prosecution. *See* Pl.’s Ex. 2 (McCarthy (USAO) Decl. ¶ 3) (“AUSA Hasib’s prosecution memoranda did not mention the race of the proposed defendants, and I did not review video or photographs of those defendants.”).

(USAO) Decl. ¶ 4).

For the **second sweep**:

- Charles Atakora, Special Agent of the DEA. Mr. Atakora appears to have worked on the second sweep cases only. He was assigned to OSS by his supervisor as the Case Agent. He “coordinated the investigations, collected evidence and presented twenty[-]three cases to the [USAO]. The [USAO] then presented the evidence to the grand jury which resulted in twenty[-]three indictments.” Pl.’s Ex. 3 (Atakora (DEA) Decl. ¶ 1). According to Mr. Atakora, the investigation focused on “repeat offenders, prior arrestees, and/or known narcotic dealers in the Tenderloin . . . that were conducting narcotic transactions near schools.” Pl.’s Ex. 3 (Atakora Decl. (DEA) Decl. ¶ 2). Also according to Mr. Atakora, he “did not consider race during the investigative process, and [he is] not aware of any investigator or prosecutor considering race during [OSS].” Pl.’s Ex. 3 (Atakora Decl. (DEA) Decl. ¶ 2). Like Ms. Dorais, Mr. Atakora does not explain whether he directly supervised each team member in the field when the arrests were made or whether he delegated the arrest decision to other law enforcement officers, *e.g.*, other DEA officers or SFPD officers.
- Sarah Hawkins, AUSA in the USAO. There are technically two declarations from Ms. Hawkins, one being submitted as a part of this motion and one that was submitted earlier in the proceedings in conjunction with a different motion. *See* Pl.’s Ex. 1 (Hawkins (USAO) Decl.); Pl.’s Ex. 2 (Supp. Hawkins (USAO) Decl.). Ms. Hawkins worked only on second sweep cases. More specifically, she worked on cases involving 12 out of the 23 persons implicated in the second sweep. *See* Pl.’s Ex. 1 (Hawkins (USAO) Decl. ¶¶ 2-3). Ms. Hawkins recommended prosecutions for these 12 people. (She did not have the authority to commence prosecutions.) *See* Pl.’s Ex. 1 (Hawkins (USAO) Decl. ¶¶ 1-3). For each of the cases, she was “provided an account of the individual’s conduct memorialized in a [DEA] Form 6, surveillance video of drug buys taken by the [SFPD], and the criminal history of the defendant.” Pl.’s Ex. 1 (Hawkins (USAO) Decl. ¶ 5); *see also* Pls.’ Ex. 2 (Supp. Hawkins (USAO) Decl. ¶ 2). She recommended prosecutions based on the

1 sufficiency of the evidence and did not consider race. *See* Pl.’s Ex. 1 (Hawkins (USAO)
2 Decl. ¶¶ 4-5). She worked on her OSS cases independent of the other line AUSA (*i.e.*, Mr.
3 Farnham). *See* Pl.’s Ex. 1 (Hawkins (USAO) Decl. ¶ 10).

4 • Lloyd Farnham, AUSA in the USAO. There are technically two declarations from Mr.
5 Farnham, one being submitted as a part of this motion and one that was submitted earlier in
6 the proceedings in conjunction with a different motion. *See* Pl.’s Ex. 1 (Farnham (USAO)
7 Decl.); Pl.’s Ex. 2 (Supp. Farnham (USAO) Decl.). Like Ms. Hawkins, Mr. Farnham
8 worked only on second sweep cases. More specifically, he worked on cases involving 11
9 out of the 23 persons implicated in the second sweep. *See* Pl.’s Ex. 1 (Farnham (USAO)
10 Decl. ¶¶ 2-3). Mr. Farnham recommended prosecutions for these 11 people. (He did not
11 have the authority to commence prosecutions.) *See* Pl.’s Ex. 1 (Farnham (USAO) Decl. ¶¶
12 1-3). For each of the cases, he was “provided an account of the individual’s conduct
13 memorialized in a [DEA] Form 6, surveillance video of drug buys taken by the [SFPD],
14 and the criminal history of the defendant.” Pl.’s Ex. 1 (Farnham (USAO) Decl. ¶ 5); *see*
15 *also* Pls.’ Ex. 2 (Supp. Farnham (USAO) Decl. ¶ 2). He recommended prosecutions based
16 on the sufficiency of the evidence and did not consider race. *See* Pl.’s Ex. 1 (Farnham
17 (USAO) Decl. ¶¶ 4-5). He worked on his OSS cases independent of the other line AUSA
18 (*i.e.*, Ms. Hawkins). *See* Pl.’s Ex. 1 (Farnham (USAO) Decl. ¶ 10).

19 • Kevin Barry, AUSA in the USAO. There are technically two declarations from Mr. Barry,
20 one being submitted as a part of this motion and one that was submitted earlier in the
21 proceedings in conjunction with a different motion. *See* Pl.’s Ex. 1 (Barry (USAO) Decl.);
22 Pl.’s Ex. 2 (Supp. Barry (USAO) Decl.). Mr. Barry worked only on second sweep cases.
23 More specifically, Mr. Barry approved the recommendation of prosecution for 7 out of the
24 23 people captured in the second sweep. *See* Pl.’s Ex. 1 (Barry (USAO) Decl. ¶¶ 2-3).
25 Mr. Barry authorized the prosecutions based on the sufficiency of the evidence and did not
26 consider race. In fact, he was “unaware of any individual’s race at the time [he] authorized
27 prosecution to the grand jury, and [he] remained unaware of their race at the time the grand
28 jury returned the indictments.” Pl.’s Ex. 1 (Barry (USAO) Decl. ¶ 5). Mr. Barry did

consider the individual's criminal history prior to authorizing an indictment because OSS was "targeted [at] persistent, recidivist, and repeat offenders selling drugs near schools in the Tenderloin." Pl.'s Ex. 1 (Barry (USAO) Decl. ¶ 7). Three of the 7 persons whom Mr. Barry authorized for prosecution were career offenders, and another 2 were likely classified as Category III. *See* Pl.'s Ex. 1 (Barry (USAO) Decl. ¶ 7).

- Daniel Kaleba, AUSA in the USAO. There are technically two declarations from Mr. Kaleba, one being submitted as a part of this motion and one that was submitted earlier in the proceedings in conjunction with a different motion. *See* Pl.'s Ex. 1 (Kaleba (ASAO) Decl.); Pl.'s Ex. 2 (Supp. Kaleba (USAO) Decl.). Mr. Kaleba worked only on second sweep cases. More specifically, Mr. Kaleba approved the recommendation of prosecution for 16 out of the 23 people captured in the second sweep. *See* Pl.'s Ex. 1 (Kaleba (USAO) Decl. ¶¶ 2-3). Mr. Kaleba authorized the prosecutions based on the sufficiency of the evidence and did not consider race. In fact, he was "unaware of any individual's race at the time [he] authorized prosecution to the grand jury, and [he] remained unaware at the time the grand jury returned its indictments." Pl.'s Ex. 1 (Kaleba (USAO) Decl. ¶ 5). Mr. Kaleba did consider the individual's criminal history prior to authorizing an indictment because OSS was "targeted [at] persistent, recidivist, and repeat offenders selling drugs near schools in the Tenderloin." Pl.'s Ex. 1 (Kaleba (USAO) Decl. ¶ 6). Nine of the 16 persons whom Mr. Kaleba authorized for prosecution were career offenders. *See* Pl.'s Ex. 1 (Kaleba (USAO) Decl. ¶ 6).

Surprisingly, the government has *not* provided *any* declarations from SFPD officers or any nonsupervisory DEA agents about the actual operation of OSS. *As a result, the Court has no information on the critical question as to how the targeting and arrests of the OSS defendants operated in the field.* While there is evidence that high-level supervisors did not direct officers in the field to target suspects on the basis of race, the government offers no explanation as to how the highly improbable outcome that all 37 suspects were African Americans occurred, even though it appears from the record that African Americans constitute roughly 60%, not 100%, of drug trafficking in the Tenderloin. The government presented no evidence of how suspects for OSS

1 “buys” were selected.

2 At the hearing, the government suggested for the first time that, as OSS operated in the
3 Tenderloin, certain corners of the area were targeted first, which explained why all the OSS
4 defendants are all African American – *i.e.*, those corners of the Tenderloin are dominated by
5 African American drug dealers as opposed to, *e.g.*, Hispanic drug dealers. But the government
6 never presented to the Court any *evidence* supporting this claim. Moreover, that representation,
7 even if true, is problematic; it does not address who made the decision as to which corners should
8 first be targeted and *why* only corners dominated by African American were targeted. Nor does
9 the representation address Defendants’ evidence showing racial patterns are not so clear as the
10 government contends. For instance, non-African Americans were, in fact, arrested for drug
11 offenses (by the SFPD) all over the Tenderloin –even on corners that purportedly had
12 predominantly African American drug dealers; yet, no non-African American drug dealers in
13 those areas was ever arrested and prosecuted for a federal crime under OSS. *See* Sommerfeld
14 (FPD) Decl. ¶ 9 & Att. C (map showing location of Tenderloin arrests with respect to San
15 Francisco Superior Court charging data).

16 The fact that the government failed to present any evidence as to how OSS suspects were
17 selected for “buys” and arrested for OSS prosecution – despite Defendants’ substantial evidence
18 suggesting race-based enforcement – is puzzling. At the hearing, the government stated that the
19 lack of any evidence from the SFPD was because the SFPD refused to cooperate or provide
20 assistance. This is surprising given that SFPD officers appear routinely in federal prosecution for
21 *e.g.*, drug offenses, including prosecution arising out of OSS specifically. Obtaining SFPD
22 cooperation in prosecutions where the SFPD has been involved in investigations and arrests has
23 never been a problem to this Court’s knowledge. It is also questionable why the government
24 could have not compelled at least some of the SFPD officers to cooperate since some were also
25 cross-designated as federal agents. Furthermore, the government failed to explain why it did not
26 secure any declarations from nonsupervisory DEA agents who were familiar with the operation in
27 the field. Although the government indicated, at the hearing, that one of the supervisory DEA
28 agents did actually participate in the targeting and/or arrest of some of the OSS defendants, his

1 declaration is, notably, lacking in any detail about how the targeting and arrests actually operated
2 in the field (*e.g.*, how were the targeting decisions made?).

3 As a consequence, Defendants' evidence of selective enforcement is left largely
4 un rebutted.

5 IV. SELECTIVE ENFORCEMENT

6 As stated above, Defendants seek discovery on two different theories: (1) selective
7 enforcement and (2) selective prosecution. The Court addresses the selective enforcement theory
8 first.

9 A. Dismissal as a Remedy for Selective Enforcement

10 As an initial matter, the government argues that Defendants' motion to compel discovery
11 on the selective enforcement theory should be denied outright because dismissal is not a remedy
12 where a criminal defendant raises a claim of selective enforcement. The Court does not find the
13 government's position persuasive.

14 First, the Court takes note that the government does not challenge dismissal as an available
15 remedy for a selective prosecution claim – only as a remedy for a selective enforcement claim.⁹
16 But racial discrimination in enforcement of criminal laws is constitutionally as injurious as racial
17 discrimination in prosecution. It is difficult to discern why selective prosecution warrants
18 dismissal, but selective enforcement (upon which prosecution is necessarily predicated) would not.

19
20 ⁹ As noted above, in *Armstrong*, the Supreme Court stated in a footnote that it had “never
21 determined whether dismissal of the indictment, or some other sanction, is the proper remedy if a
22 court determines that a defendant has been the victim of *prosecution* on the basis of his race.”
23 *Armstrong*, 517 U.S. at 461 n.2 (emphasis added). Notwithstanding this statement, the
24 government does not dispute that dismissal is in fact a remedy for a claim of selective prosecution.
25 Indeed, that the remedy of dismissal is proper is supported by *Yick Wo v. Hopkins*, 118 U.S. 356
26 (1886), which is discussed *infra*. Furthermore, circuit courts that have acknowledged that
27 dismissal is a remedy for a selective prosecution claim, *see, e.g., In re Aiken County*, 725 F.3d
28 255, 264 n.7 (D.C. Cir. 2013) (stating that, “[i]f the Executive selectively prosecutes based on
impermissible considerations, the equal protection remedy is to dismiss the prosecution”); *United
States v. Vasquez*, 145 F.3d 74, 82 n.6 (2d Cir. 1998) (stating that “[s]elective prosecution claims
usually come up in litigation as affirmative defenses to prosecution, and the remedy is generally
dismissal of the suit that was selectively prosecuted”); *Feder v. Village of Shiloh*, No. 97-1101,
1997 U.S. App. LEXIS 19190, at *5 n.3 (7th Cir. July 22, 1997) (acknowledging the *Armstrong*
footnote but adding that the remedy of dismissal “seems to be implicit in other decisions of the
Supreme Court, and this court implicitly has accepted that as the correct remedy”), and the
government does not point to any authority to the contrary.

1 Racially selective action by law enforcement inflicts harm whether it is perpetrated by law
 2 enforcement in the streets or by a prosecutor in an office – both inflict substantial injury on the
 3 victim and society: in addition to violating the victim’s rights to equality and liberty, such
 4 discriminatory conduct impugns the integrity of the criminal justice system and compromises
 5 public confidence therein. As the Tenth Circuit explained in *Alcaraz-Arellano*, “[r]acially
 6 selective law enforcement violates this nation’s constitutional values at the most fundamental
 7 level; indeed, unequal application of criminal law to white and black persons was one of the
 8 central evils addressed by the framers of the Fourteenth Amendment.” *Id.* at 1263. The Seventh
 9 and Tenth Circuits have likewise held that dismissal of criminal proceedings is a proper remedy
 10 for selective enforcement. *See Davis*, 793 F.3d at 712 (en banc) (addressing a motion to dismiss
 11 based on selective enforcement); *Alcaraz-Arellano*, 441 F.3d at 1252 (same).

12 At the hearing, the government suggested that dismissal as a remedy for selective
 13 enforcement would be unfair to prosecutors who did not engage in discrimination. This argument
 14 is flawed. It ignores the fact that, in cases of selective enforcement, even if the prosecutors did not
 15 discriminate, law enforcement did, and thus there has still been a constitutional injury suffered by
 16 the victim of discrimination. The focus of the Fourteenth Amendment is not so much what is fair
 17 to prosecutors, but what is fair for the victims of discrimination.

18 Second, as amicus ACLU points out in its brief, in *Yick Wo*, the Supreme Court found
 19 dismissal an appropriate remedy for selective enforcement. In *Yick Wo*, the petitioners were
 20 Chinese persons who were arrested and ultimately imprisoned for violating local ordinances
 21 regarding laundry establishments. Each ordinance provided that it was unlawful for persons to
 22 operate laundry establishments in wooden buildings without first getting the consent of the board
 23 of supervisors. *See Yick Wo*, 118 U.S. at 368. The consent of the supervisors was not given to the
 24 petitioners and some 200 other Chinese persons while some 80 non-Chinese persons were
 25 “permitted to carry on the same business under similar conditions.” *Id.* at 374. The petitioners
 26 argued that their imprisonment was a violation of the Equal Protection Clause (*i.e.*, based on race).
 27 The Supreme Court agreed, holding that the administration of the ordinances was
 28

directed so exclusively against a particular class of persons [*i.e.*, Chinese persons] as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are *applied by the public authorities charged with their administration*, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as to practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

Id. at 373-74 (emphasis added). The administration of the ordinances was within the province of the board of supervisors, not the local prosecutor. *See id.* at 374 (stating that “[n]o reason whatever, except the will of the supervisors, is assigned why [the petitioners] should not be permitted to carry on, in the accustomed manner, their harmless and useful occupation, on which they depend for a livelihood”). Thus, although the discrimination at issue in *Yick Wo* was a form of selective enforcement rather than selective prosecution, the Supreme Court ordered that the petitioners be discharged as a remedy for the equal protection violation – a remedy that is akin to a dismissal.

Third, while the government argues that in, *United States v. Gomez-Lopez*, 62 F.3d 304 (9th Cir. 1995) (a pre-*Armstrong* case), the Ninth Circuit held that selective enforcement is not a ground for dismissal (in the absence of a prosecutor’s knowledge of law enforcement officers’ targeting decisions), *see* Opp’n at 3-6, *Gomez-Lopez* is inapposite. In *Gomez-Lopez*, the defendant brought a claim for selective prosecution, not selective enforcement. The main holding of the case was that circuit-wide discovery was not permissible when all evidence pointed to decision-making being made at the local level. *See, e.g.*, 306-07 (stating that “the question in this case is whether the district court abused its discretion in ordering circuit-wide discovery without any indication that decision-making occurred at the circuit level”; adding that “[t]here is no evidence that the decision to prosecute [the defendant] was made by anyone other than the USAO for the Central District”).

The government protests still that *Gomez-Lopez* weighs in its favor based on the following language from the opinion:

We held in *United States v. Erne*, 576 F.3d 212 (9th Cir. 1979), that the proper focus in discriminatory prosecution cases is on the ultimate decision-maker. In *Erne*, we considered whether an evidentiary hearing was required on allegations that an Internal Revenue Service officer who referred Erne for prosecution impermissibly discriminated on the basis of Erne's exercise of his First Amendment rights. Because the revenue officer's recommendation for prosecution went through several internal reviews, and the United States Attorney ultimately decided whether to initiate criminal proceedings, we held that "even if [the revenue officer's] initial role in referring the matter for prosecution involved an improper discriminatory motive, it would be insufficient to taint the entire administrative process."

Likewise in *United States v. Greene*, 698 F.2d 1364 (9th Cir. 1983), the defendant pursued a claim of selective prosecution based on a showing that an IRS agent referred Greene for prosecution because of an impermissible motive. Again, we held that even if the agent's role in referring the matter for prosecution involved an improper discriminatory motive, it would be insufficient because "the ultimate decision to prosecute is several steps removed from the revenue officer."

Gomez-Lopez, 62 F.3d at 306. However, this language simply indicates that a selective prosecution claim should focus on the acts of the prosecutor. It does not foreclose a selective enforcement claim.

Finally, while there is authority to support the government's position – most notably, the Sixth Circuit's decision in *United States v. Nichols*, 512 F.3d 789 (6th Cir. 2008)¹⁰ – that authority is distinguishable and in any event not binding precedent on this Court. In *Nichols*, the defendant claimed that a police officer's decision to run a warrant check on him was based on his race, thus violating the Equal Protection Clause. *See id.* It appears that the only remedy sought by the defendant was exclusion – *i.e.*, suppression of evidence found by the police during a subsequent search of a vehicle that he was inside. The Sixth Circuit held that exclusion was not a remedy available for an equal protection violation. The Sixth Circuit also held that, in lieu of exclusion as a remedy, a person whose rights were allegedly violated could bring a civil lawsuit. *See id.* at 794-95. The relevant portion from *Nichols* is as follows:

¹⁰ *See also United States v. Williams*, 431 F.3d 296, 299 (8th Cir. 2005) (stating that, even if there were a due process violation based on racial profiling, "it is uncertain that dismissal is an appropriate remedy").

While we, of course, agree with the general proposition that selective enforcement of the law based on a suspect's race may violate the Fourteenth Amendment, we do not agree that the proper remedy for such violations is necessarily suppression of evidence otherwise lawfully obtained. The exclusionary rule is typically applied as a remedy for Fourth Amendment violations, which Amendment does not apply to pre-contact investigatory steps like that presented here (the decision to run a warrant check). *See Avery*, 137 F.3d at 353 (“[A]n officer's actions during the pre-contact stage cannot give rise to Fourth Amendment constitutional concerns because the citizen has not yet been ‘seized.’”). Even if the Fourth Amendment were implicated, any challenge to a search or seizure based on legitimate probable cause, but in which it is alleged the officer's subjective motive was discriminatory, is doomed to fail. *See Whren*, 517 U.S. at 813 (unanimously rejecting such a challenge and holding that “[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis”). Though the Court left open the door to equal protection challenges in the same context, it gave no hint as to what the appropriate remedy would be. *See ibid.* Since we know from *Whren* that the evidence against Nichols would not be suppressed under the Fourth Amendment (even if the officers were improperly motivated by race), we are reluctant to graft that Amendment's traditional remedy into the equal protection context. Indeed, we are aware of no court that has ever applied the exclusionary rule for a violation of the Fourteenth Amendment's Equal Protection Clause and we decline Nichols's invitation to do so here. Rather, we believe the proper remedy for any alleged violation is a 42 U.S.C. § 1983 action against the offending officers. *See, e.g., Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 308 F.3d 523 (6th Cir. 2002) (rejecting officer's qualified immunity defense and affirming partial summary judgment in favor of Hispanic motorists who brought equal protection challenge under § 1983).

Id. at 794.

The Sixth Circuit's holding in *Nichols* is not persuasive. First, *Nichols* did not address the remedy of dismissal; but to the extent one could infer from *Nichols* that dismissal of an indictment, like exclusion, would not be an appropriate remedy for selective enforcement, such a result cannot be squared with *Yick Wo*, where as noted above, the Supreme Court ordered the remedy of discharge; notably, the fact that a § 1983 civil lawsuit was theoretically available was not a factor.¹¹

Furthermore, in *Nichols*, the Sixth Circuit's decision was based on its reluctance to graft the remedy exclusion on to the Fourteenth Amendment because of that remedy's traditional

¹¹ Section 1983 was enacted prior to *Yick Wo*. *See Filarsky v. Delia*, 132 S. Ct. 1657, 1658 (2012) (noting that § 1983 was enacted in 1871).

1 association with the Fourth Amendment. Apart from the fact that the Fourteenth Amendment is a
 2 different constitutional source providing for different protections than the Fourth Amendment,¹² in
 3 *Nichols*, “there was no intrusion at all on Nichols’s personal liberties by the initial actions of the
 4 officer [–] [t]here was no search, no seizure.” *Id.* at 795. Under those circumstances, the Court
 5 appeared to view exclusion is an extreme remedy. Here, in contrast, Defendants were subject to
 6 seizure and then referred to federal authority for prosecution for charges which entailed an
 7 enhanced mandatory minimum sentence.¹³ Unlike *Nichols*, the selective enforcement here did
 8 operate to inflict a substantial intrusion upon Defendants’ personal liberties.

9 Moreover, while the Sixth Circuit grounded its analysis in terms of deterrence as the focus
 10 of the exclusionary rule,¹⁴ the remedy for a Fourteenth Amendment violation encompasses more
 11 than deterrence. *Cf. Alcaraz-Arellano*, 441 F.3d at 1263 (stating that “[r]acially selective law
 12 enforcement violates this nation’s constitutional values at the most fundamental level; indeed,
 13 unequal application of criminal law to white and black persons was one of the central evils
 14 addressed by the framers of the Fourteenth Amendment”). While dismissal of charges brought
 15 about as a result of a constitutional violation may serve in part as a deterrent to race-based law
 16 enforcement, it is also designed in part to redress that violation. *Cf. Davis v. United States*, 564
 17 U.S. 229, 236-37 (2011) (stating that the exclusionary rule is a judicially created remedy the only
 18 purpose of which “is to deter future Fourth Amendment violations”; exclusion is not even
 19 “designed to ‘redress’ the injury occasioned by an unconstitutional search”) (emphasis added). It
 20 puts the victim where he or she could have been but for racially selective conduct of law

21
 22 ¹² It could also be argued that violation of the Fourteenth Amendment as a result of racially
 23 selective law enforcement is by definition more likely to be a systemic practice than an unlawful
 24 search.

25 ¹³ In most cases, the quantity of drugs charged was small, but because the sales occurred within
 26 1,000 feet of a school, charges if proven carried an enhanced sentence under 21 U.S.C. § 860. *See*
 27 21 U.S.C. § 860(a) (providing that a violator is “subject to (1) twice the maximum punishment
 28 authorized by section 401(b) [21 U.S.C. § 841(b)], and (2) at least twice any term of supervised
 release authorized by section 401(b) for a first offense”). This enhancement applied even if the
 amount sold was only a fraction of a gram of crack cocaine, as occurred in OSS.

¹⁴ *See Lingo v. City of Salem*, No. 14-35344, --- F.3d --- (9th Cir. June 27, 2016) (emphasizing
 deterrence rationale for exclusionary rule).

1 enforcement.

2 *Nichols's* assumption that a Fourteenth Amendment violation can adequately be addressed
3 through a civil lawsuit is questionable. It is not clear a civil remedy for selective enforcement
4 leading to a prosecution is available, particularly if the defendant is convicted. *See Heck v.*
5 *Humphrey*, 512 U.S. 477, 487 (1994) (stating that, if “a judgment in favor of the plaintiff would
6 necessarily imply the invalidity of his conviction or sentence the complaint must be dismissed
7 unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated”);
8 *Young v. City of Peoria*, No. 12-cv-1086, 2012 U.S. Dist. LEXIS 153861, at *10 n.5 (C.D. Cal.
9 June 29, 2012) (noting that “Young may not be able to bring a § 1983 claim for damages from an
10 unlawful state conviction without first having the conviction overturned in some manner [under
11 *Heck*]” and that “Young’s selective prosecution claim, if successful, would necessarily mean that
12 his conviction was unlawful”).

13 Accordingly, the Court concludes, consistent with the holdings of the Seventh and Tenth
14 Circuits, that dismissal of an indictment is a proper remedy for a selective enforcement claim if
15 proven. Having so held, the Court must next address whether there is some evidence of
16 discriminatory effect and then some evidence of discriminatory intent sufficient to warrant
17 discovery.

18 B. Selective Enforcement – Discriminatory Effect

19 1. Similarly Situated Evidence Requirement

20 As an initial matter, the Court addresses Defendants’ contention that discriminatory effect
21 for selective enforcement purposes can be established based simply on the fact that all 37 OSS
22 defendants are African American – *i.e.*, there is no need to do the *Armstrong* similarly situated
23 analysis. This is the approach that the Seventh Circuit adopted in *Davis* (discussed above).

24 As noted above, *Davis* held that, as a general matter, in a selective enforcement case, a
25 defendant need not necessarily provide some evidence as to preferential treatment of similarly
26 situated persons outside the protected class in order to obtain discovery. Rather, the defendant can
27 simply rely on statistics showing, *e.g.*, that a significant majority of persons targeted by law
28

enforcement is made up of members of a protected class.¹⁵ Under *Davis*, Defendants have established some evidence of discriminatory effect because all 37 of those targeted and arrested under the OSS program for whom the Court has information are all African American.¹⁶ Defendants have submitted undisputable evidence that these numbers are highly significant as a statistical matter. The Court agrees with the approach in *Davis* and thus finds the statistical showing made by Defendants herein establishes discriminatory effect of selective enforcement.

2. Similarly Situated Evidence

Assuming, however, a statistical showing alone is not sufficient to show discriminatory effect under *Armstrong*, and that the similarly situated requirement must be shown even in a selective enforcement (as opposed to selective prosecution) case, Defendants have satisfied that requirement. Defendants have shown some evidence that “similarly situated individuals of a different race were not [targeted]” by law enforcement. *Armstrong*, 517 U.S. at 465.

To be sure, there is a threshold question of what the *Armstrong* Court meant by “similarly situated.” In their motion, Defendants have provided examples of how various circuit courts have defined the term. *See* Mot. at 72-75. *See, e.g., United States v. Lewis*, 517 F.3d 20, 25 (1st Cir. 2008) (stating that “[a] similarly situated offender is one outside the protected class who has committed roughly the same crime under roughly the same circumstances but against whom the law has not been enforced”); *United States v. Olvis*, 97 F.3d 739, 744 (4th Cir. 1996) (stating that “defendants are similarly situated when their circumstances present no distinguishable legitimate prosecutorial factors that might justify making different prosecutorial decisions with respect to them”). The Ninth Circuit has not defined “similarly situated” since *Armstrong* was decided. However, in a pre-*Armstrong* decision, the Ninth Circuit noted as follows:

The goal of identifying a similarly situated class of law breakers is to isolate the factor allegedly subject to impermissible

¹⁵ At least one circuit court seems to have disagreed with the holding in *Davis* (although, admittedly, the case was decided before *Davis*). *See Alcaraz-Arellano*, 441 F.3d at 1264 (stating that “[s]imilar caution is required in reviewing a claim of selective law enforcement”).

¹⁶ As noted above, 6 out of the 43 persons arrested under OSS were ultimately not prosecuted. There is no evidence as to what the racial identities of those 6 persons are.

discrimination. The similarly situated group is the control group. The control group and defendant are the same *in all relevant respects*, except that defendant was, for instance, exercising his first amendment rights. If all other things are equal, the prosecution of only those persons exercising their constitutional rights gives rise to an inference of discrimination. But where the comparison group has less in common with defendant, then factors other than the protected expression may very well play a part in the prosecution.

United States v. Aguilar, 883 F.2d 662, 706 (9th Cir. 1989) (emphasis added), *superseded by statute on other grounds as stated in United States v. Gonzalez-Torres*, 273 F.3d 1181, 1187 (9th Cir. 2001).

This approach makes sense and it consistent with how the term “similarly situated” is understood in civil discrimination cases. *See United States v. Brantley*, 803 F.3d 1265, 1271-72 (11th Cir. 2015) (in a selective prosecution case, noting that, “[i]n a different context – when a Title VII plaintiff complains she was treated differently than a similarly situated co-worker – we have required the plaintiff and the employee to be similarly situated ‘in all relevant respects’” in order “to prevent courts from second-guessing a reasonable decision by the employer”; “[t]he same considerations apply in a challenge based upon selective prosecution” – *i.e.*, “a court is not free to second-guess the prosecutor’s exercise of a charging discretion”).

But, importantly, there is no magic formula for determining who is similarly situated. “Different factors will be relevant for different types of inquiries – it would be imprudent to turn a common-sense inquiry into a complicated legal one.” *Chavez v. Ill. St. Police*, 251 F.3d 612, 635 (7th Cir. 2001) (§ 1983 selective enforcement case). A court should take “care[] not to define the [similarly situated] requirement too narrowly.” *Id.* Here, similarly situated should include consideration of the goals of the program. As discussed below, even under the government’s purported criteria for prosecution under OSS (*e.g.*, history of drug dealing, strength of the evidence), Defendants have demonstrated there were similarly situated non-African Americans who were not arrested and subject to prosecution under OSS.

Defendants’ evidence on this point includes:

- 100% of the OSS defendants are African American, which contrasts with the San Francisco Superior Court charging data obtained by Defendants (61.4% of those arrested and charged for drug-trafficking crimes in the Tenderloin were African American, **24.7%**

1 **were Latino, and 10.7% were white)** and the survey information obtained by Defendants
 2 (56% of the Tenderloin drug transactions involved African American drug sellers, **20%**
 3 **involved Latino drug sellers, and 16.8% involved white drug sellers**). *See* Mot. at 14,
 4 21, 76; *cf. Armstrong*, 517 U.S. at 470 (noting that “respondents could have investigated
 5 whether similarly situated persons of other races were prosecuted by the State of California
 6 and were known to federal law enforcement officers, but were not prosecuted in federal
 7 court”).

- 8 • The San Francisco Superior Court charging data includes **hundreds of cases involving**
 9 **non-African Americans** that could have been charged with a violation of § 860
 10 specifically because “[a]lmost every area of the Tenderloin falls within 1,000 feet of a
 11 playground or educational institutional.” Mot. at 76.
- 12 • Defendants have identified approximately **sixty specific instances in which non-African**
 13 **American drug dealers** were arrested for committing drug-trafficking crimes in the
 14 Tenderloin in recent years but were not federally charged under OSS.
- 15 • Video from one of the OSS cases (now resolved) (*United States v. Roberts*, No. CR-13-
 16 0760 CRB) where the undercover informant **declines to buy drugs from an Asian**
 17 **woman and waits to buy drugs from the defendant, an African American woman.**
 18 *See* Mot. at 60-61; *see also United States v. Anthony*, No. CR-15-0005 EMC (Docket No.
 19 11-2) (Phillips (FPD) Decl., Ex. G) (video in *Roberts* case).

20 The Court agrees with Defendants that this is enough to satisfy the similarly situated
 21 evidence requirement for discovery purposes. The evidence shows there are substantial numbers
 22 (and a substantial proportion) of drug dealers in the Tenderloin who are *not* African American; yet
 23 they were not stopped or arrested under OSS. Defendants have proffered specific examples of
 24 similar situated non-African Americans not arrested and charged in OSS.

25 In its papers, the government protests that nonetheless the similarly situated requirement
 26 has not been met. For example, the government asserts that the OSS cases are different from the
 27 comparator cases cited by Defendants because the OSS cases had strong evidence – *i.e.*, the drug
 28 transactions were videotaped. *See* Opp’n at 17 (stating that “the defendants do not cite to a

videotaped drug sale in any of the 42 John and Jane Doe cases set forth in their motion for discovery”). But as Defendants point out, that fact should have no impact on their selective enforcement theory. The question for selective enforcement is whether law enforcement was improperly targeting African Americans in the first place. That law enforcement, *after* making the targeting decision, videotaped the transaction is irrelevant to the initial selection of the target. *See* Mot. at 87. Videotape evidence simply begs the question of *whom* was targeted for an OSS “buy” in the first place.

The government also challenges Defendants’ similarly situated evidence on the ground that the examples cited by Defendants did not involve “the same basic crime” being committed “in substantially the same manner.” Opp’n at 18-19 (quoting *Smith*, 231 F.3d at 810 (Eleventh Circuit decision)).¹⁷ But there should be no real dispute here that the same basic crime was involved – drug trafficking in the Tenderloin and near a school.

The government’s real beef, therefore, seems to be about how the crimes were committed. More specifically, for the non-OSS examples provided by Defendants, not all crimes involved hand-to-hand drug deals. For example, some Does were investigated based on informant tips; searches were executed in other Doe cases. *See* Opp’n at 18-20. But the government does not seem to dispute at least some of the non-OSS cases did involve hand-to-hand drug deals. Indeed, Defendants provided additional examples in their reply brief that involved such deals. One similarly situated example is arguably all Defendants need to show discriminatory effect. *See United States v. Alabi*, 597 Fed. Appx. 991, 996 (10th Cir. 2015) (stating that “[w]e have recognized three possible methods of providing discriminatory effect in a selective-enforcement

¹⁷ In *Smith*, the Eleventh Circuit stated:

[W]e define a “similarly situated” person for selective prosecution purposes as one who engaged in the same type of conduct, which means that the comparator committed the same basic crime in substantially the same manner as the defendant – so that any prosecution of that individual would have the same deterrence value and would be related in the same way to the Government’s enforcement priorities and enforcement plan – and against whom the evidence was as strong or stronger than that against the defendant.

Smith, 231 F.3d at 810.

case: statistical evidence; *the identification of a similarly situated individual who could have been, but was not, stopped or arrested*; and, in certain circumstances, anecdotal evidence establishing an officer's pattern of similarly discriminatory behavior") (emphasis added). Moreover, even for the non-OSS examples that did not involve hand-to-hand deals, the question is whether that difference was material for the similarly situated analysis. Why did the manner of sales make a difference from the viewpoint of the objective of the OSS program? *Cf. Lewis*, 517 F.3d at 25 ("The focus of an inquiring court must be on factors that are at least arguably material to the decision as to whether or not to prosecute. Material prosecutorial factors are those that are relevant – that is, that have some meaningful relationship either to the charges at issue or to the accused – and that might be considered by a reasonable prosecutor."). The government has failed to provide an explanation as to how those differences were material. Indeed, as Defendants argue, because the OSS defendants were charged with violating § 841(a), *i.e.*, possession with mere intent to distribute, it should not matter whether there was a hand-to-hand deal. *See Reply* at 39-41 (also arguing that the government has improperly focused on how the officers investigated or discovered the crime).

Finally, the government suggests that any discriminatory effects are exaggerated because Defendants are assuming that "[OSS] selected 37 individuals for prosecution on 37 independent occasions," but that was not in fact the case: "[T]he [OSS] arrests were concentrated in a relatively small number of areas on a limited number of days. . . . [T]here was clear temporal and geographic clustering, which undermines the assumption of independence across the 37 arrests." *Opp'n* at 26. But Defendants' expert addresses this in her supplemental report.

In any given data set, some arrests are potentially "clustered" by time and space. For example, arrests involving parties involved in the same criminal event are not temporally or spatially independent of each other. Yet this fact has not prevented well-respected, peer-reviewed social science journals from publishing research that uses the Z-score test to assess the likelihood that any racial disparities between the arrested population and other benchmarks are the result of chance.

Amram (FPD) Reply Decl., Att. A (Supp. Beckett Rpt. at Ex. 05248). The government did not provide any expert report in support of its position.

Furthermore, the government's claim of temporal and geographic clustering appears

overstated. For the first OSS sweep, 14 OSS defendants were arrested on 8 different days in 10 different locations; for the second OSS sweep, 23 defendants were arrested on 8 different days in 10 different locations. *See Cruz-Laucirica (FPD) Decl., Att. A* (chart providing, *inter alia*, dates and locations of arrests). As reflected by maps prepared by Defendants, some of the locations are in relatively close proximity to one another but a fair number of the locations are also dispersed in different parts of the Tenderloin. *See Sommerfeld (FPD) Decl., Att. E-F* (maps showing locations of arrests). This is not a situation where, *e.g.*, a majority of the arrests took place in just a few locations within the Tenderloin. In any event, the government failed to produce *any* evidence as to how any clustering could have resulted in 37 out of 37 defendants being African American.

Accordingly, even if there were a similarly situated requirement for discriminatory effect in a selective enforcement case, the Court concludes that Defendants have made the required showing of some evidence in support.

C. Selective Enforcement – Discriminatory Intent

Regarding discriminatory intent, the Ninth Circuit has noted that “[a]wareness of consequences’ is not the same as intent to discriminate. The kind of intent to be proved is that the government undertook a particular course of action ‘at least in part “because of,” not merely “in spite of” its adverse effects upon an identifiable group.’” *United States v. Turner*, 104 F.3d 1180, 1184 (9th Cir. 1997); *see also Wayte v. United States*, 470 U.S. 598, 610 (1985) (stating that “[d]iscriminatory purpose . . . implies more than . . . intent as awareness of consequences”) (internal quotation marks omitted). Of course, discriminatory intent in the instant case is somewhat of a complicated matter – both for purposes of selective enforcement and selective prosecution – because the Court is being asked to consider the discriminatory intent of many different individuals. But notwithstanding this difficulty, the Court concludes that Defendants have adequately shown some evidence of discriminatory intent, in particular, within the SFPD.

As an initial matter, the fact that 100% of all the OSS defendants are African American is probative of discriminatory intent, particularly when the relevant population is not 100% African American. *See Mot. at 82* (arguing that “[t]he statistical disparity present here is so dramatic that

it alone should suffice for making a prima facie case of discriminatory intent”); *Belmontes v. Brown*, 414 F.3d 1094, 1127 (9th Cir. 2005) (stating that habeas petitioner’s statistics “may support a prima facie showing of unlawful charging discrimination” because they focused on the decisionmaker at the local level), *rev’d on other grounds by Ayers v. Belmontes*, 549 U.S. 7 (2006); *Tuitt*, 68 F. Supp. 2d at 10 (in making an *Armstrong* evaluation, stating that “[a] discriminatory effect which is severe enough can provide sufficient evidence of discriminatory purpose”; citing, *inter alia*, *Yick Wo*). As Defendants argue, this is comparable to the “inexorable zero” in the civil employment context. *See Woodson v. Pfizer*, 34 Fed. Appx. 490, 493 (7th Cir. 2002) (stating that, “[u]nder the ‘inexorable zero’ test, we held that when an employer with a statistically large enough workforce employs no African Americans, we can infer that the employer intentionally discriminates against African Americans in its hiring decisions”); *NAACP v. Town of E. Haven*, 70 F.3d 219, 225 (2d Cir. 1995) (stating that “evidence that an employer in an area with a sizeable black population has never hired a single black employee . . . , by itself, supports an inference of discrimination”; *see also Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 342 n.23 (1977) (stating that a “company’s inability to rebut the inference of discrimination came not from a misuse of statistics but from ‘the inexorable zero’”). *But see Chavez*, 251 F.3d at 647-48 (Seventh Circuit decision noting that “[o]nly in ‘rare cases [has] a statistical pattern of discriminatory impact demonstrated a constitutional violation [e.g., jury venire]”); also stating that, “in his context, statistics may not be the sole proof of a constitutional violation and neither Chavez nor Lee have presented sufficient non-statistical evidence to demonstrate discriminatory intent”); *cf. Olvis*, 97 F.3d at 745-46 (stating that, “in cases involving discretionary judgments ‘essential to the criminal justice process,’ statistical evidence of racial disparity is insufficient to infer that *prosecutors* in a particular case acted with a discriminatory purpose”) (emphasis added).

Moreover, aside from the inexorable zero, Defendants have offered additional evidence of discriminatory intent. For example:

- Evidence that the SFPD generally was “aware[] of the presence, behavior, and specific geographic locations frequented by Hispanic/Latino dealers” in the Tenderloin, as reflected

1 in several SFPD incident reports. Mot. at 22 (giving six SFPD incident reports as
2 examples).

- 3 • Evidence that some of the SFPD officers who were a part of OSS knew about the existence
4 of non-African American drug dealers in the Tenderloin, as they were personally involved
5 with the arrests of more than 30 non-African American comparators identified in
6 Defendants' opening and reply briefs. *See* Reply at 37-38.

7 Evidence of such knowledge combined with the failure to arrest any non-African American drug
8 dealers as part of OSS gives rise to an inference of discrimination.

9 Finally, there is further evidence of discriminatory intent based on (1) the OSS case where
10 a SFPD officer made the "fucking BMs" comment; (2) the OSS case where an informant avoided
11 a non-African American drug dealer and waited instead for an African American drug dealer; and
12 (3) race-based comments or conduct by at least some of the SFPD officers who worked on OSS,
13 albeit in non-OSS situations (with many of these officers working on multiple OSS cases).

14 The totality of the above evidence constitutes some evidence of discriminatory intent.

15 Contrary to what the government suggests, the declarations from the supervisory DEA
16 agents and the federal prosecutors do not dispel the inference of discriminatory intent. Notably, as
17 previously noted, the supervisory DEA agents do not describe how targeting decisions were
18 actually made in the field, and there are no declarations from any "line" DEA agents or any SFPD
19 officer. Furthermore, just because a supervisory DEA agent was not aware of any racism, *see*
20 Opp'n at 12, is hardly enough to say that there was no race-based selectivity by officers in the
21 field.

22 D. Summary

23 For the foregoing reasons, the Court concludes that dismissal is a remedy for a selective
24 enforcement claim and that Defendants have submitted sufficient evidence of both discriminatory
25 effect and discriminatory intent such that they are entitled to discovery in support of their selective
26 enforcement claim.

V. **SELECTIVE PROSECUTION**

A. **Selective Prosecution**

While there is some evidence of discriminatory effect and discriminatory intent in selective enforcement, the evidence as to selective prosecution is more complicated.

The government points out that *Armstrong* assumed there has to be a selection in order for there to be a selective prosecution case. This position has merit. *See Armstrong*, 517 U.S. at 469 (stating that “selective prosecution implies that a selection has taken place”) (internal quotation marks omitted). Thus, as to the claim of selective prosecution, the focus should be on whether the prosecutors who made the charging decisions (in contrast to police officers in the field) engaged in race-based selectivity in deciding whether to prosecute Defendants.

In this case, the record does not establish that federal prosecutors who made prosecutorial decisions were aware (either individually or collectively) of similarly situated non-African Americans that could have been presented for prosecution but were not. The only evidence on this point is the declarations of prosecutors that they had no such awareness. To be sure, this fact may inform discriminatory intent more so than discriminatory effect; the effect prong arguably should be measured by the pool of potential defendants known to all in the law enforcement chain, not just those presented to prosecutors.¹⁸ *See Armstrong*, 517 U.S. at 470 (stating that “respondents could have investigated whether similarly situated persons of other races were prosecuted by the State of California *and were known to federal law enforcement officers*, but were not prosecuted in federal court”) (emphasis added). Regardless, the lack of knowledge and hence race-based

¹⁸ The government contends that the similarly situated evidence provided by Defendants is not a proper comparator because the OSS cases had strong evidence – *i.e.*, videotape – to support prosecution and there is no indication that the non-OSS cases had such videotape evidence. However, Defendants have made a fair case that the videotape evidence is not as strong as the government asserts. *See, e.g.*, Piper (FPD) Reply ¶ 3 (stating that, in 11 OSS cases, after viewing the body-camera video evidence, she was not able “to see any money and/or substance exchanged between a defendant and an alleged purchaser”; that, in 6 OSS cases, after viewing the rooftop/building surveillance video, she was not able “to see actual substance allegedly exchanged between individuals on the street”; and that, in 3 OSS cases, after viewing the rooftop/building surveillance video, she was not able “to clearly see the interaction due to blurred image, camera zoom, or lack of lighting”). Moreover, the government fails to address the fact that non-OSS cases often had strong evidence in other forms such as the sale of drugs to an undercover officer. *See Reply* at 35.

1 selection by prosecutors is critical to the equal protection claim of selective prosecution.

2 As to discriminatory intent, Defendants argue that at the very least, the prosecutors knew at
 3 some point that all those prosecuted under the OSS were African American, and that this should
 4 satisfy *Armstrong*. However, “[a]wareness of consequences’ is not the same as intent to
 5 discriminate. The kind of intent to be proved is that the government undertook a particular course
 6 of action ‘at least in part “because of,” not merely “in spite of” its adverse effects upon an
 7 identifiable group.’” *Turner*, 104 F.3d at 1184; *see also Wayte*, 470 U.S. at 610 (stating that
 8 “[d]iscriminatory purpose . . . implies more than . . . intent as awareness of consequences”)
 9 (internal quotation marks omitted).

10 Defendants have offered several theories regarding discriminatory intent:

- 11 (1) Discriminatory intent can be inferred from the inexorable zero (*i.e.*, that none of the
 12 defendants prosecuted pursuant to OSS are not African American);
- 13 (2) Discriminatory intent can be inferred because not all OSS defendants met the charging
 14 criteria (*e.g.*, not all OSS defendants had a high-level criminal history);
- 15 (3) Discriminatory intent can be inferred because the prosecutors did not in place any policy to
 16 ensure against SFPD discriminatory animus; and

17 But these theories are problematic, whether taken individually or collectively. For
 18 example, the inexorable zero theory while viable in some contexts of discrimination jurisprudence,
 19 has yet to be applied to selective prosecution claims. *See Olvis*, 97 F.3d at 745-46 (stating that,
 20 “in cases involving discretionary judgments ‘essential to the criminal justice process,’ statistical
 21 evidence of racial disparity is insufficient to infer that prosecutors in a particular case acted with a
 22 discriminatory purpose”; adding that, “[b]y ruling that defendants can meet these demanding
 23 burdens by presenting a study of the type they presented in this case [*i.e.*, that more than 90% of
 24 those who had been tried since 1992 for crack cocaine offenses in certain divisions are black] and
 25 thereby shifting to the government the onus of dispelling a presumption of discrimination would
 26 open virtually every prosecution to a claim for selective prosecution”). At the very least, the Court
 27 in *Armstrong* did not recognize its application in this context.

28 Defendants’ assertion that discriminatory intent can be inferred because not all OSS

defendants met the charging criteria (*e.g.*, not all OSS defendants were persistent, recidivist, and repeat offenders) is problematic given that they have identified only about 1/4 of the OSS defendants who did not meet the charging criteria.¹⁹ *See* Mot. at 84-85 (identifying 9 OSS defendants). This factual showing is not compelling evidence of discriminatory intent.

Defendants contend that discriminatory intent can be inferred because the prosecutors did not put in place any policy to ensure against SFPD discriminatory animus. *See, e.g.*, Mot. at 90. This fact perhaps establishes negligence in management or maybe even deliberate indifference to the disparate consequences of its prosecutorial decisions.²⁰ But this would not establish the requisite intentionality currently required under *Armstrong* to support a claim of selective prosecution. Defendants cite *Wayte* to support their argument, but the language they cite is from the *dissent*. *See* Reply at 41 n.27 (noting that opening brief failed to identify language from *Wayte* as coming from the dissent). More specifically, Justice Marshall, in dissenting, stated that, to make out a *prima facie* case of selective prosecution, a person must show (1) “that he is a member of a recognizable, distinct class”; (2) “that a disproportionate number of this case was selected for investigation and possible prosecution”; and (3) “*that this selection procedure was subject to abuse or otherwise not neutral.*” *Wayte*, 470 U.S. at 626 (Marshall, J. dissenting) (emphasis added). Justice Marshall, in turn, cited *Castaneda v. Partida*, 430 U.S. 482 (1977), for this proposition, but *Castaneda* is arguably distinguishable because it was a case involving an equal protection claim in a very specific context – *i.e.*, the grand jury context. *See id.* at 494; *see also Batson v. Kentucky*, 476 U.S. 79, 95 (1986) (stating that, “[i]n cases involving the venire, this Court has found a *prima facie* case [of discrimination] on proof that members of the defendant’s

¹⁹ The government quibbles that a person with high-level criminal history is not the same thing as a repeat offender, *see* Opp’n at 32, but that seems to be elevating form over substance.

²⁰ Defendants have a fair argument for deliberate indifference, especially by the time of the 2014 sweep because, by that time, the prosecutors should have known because, “[o]nce the first fourteen people were arrested and arraigned in the 2013 sweep, the government must have been aware that they all appeared to be Black.” Mot. at 89. The statements of the individual prosecutors that they were unaware of any pattern developing in the OSS prosecutions raises troubling questions. One would hope and expect the U.S. Attorney’s Office would have a systematic way of overseeing and discerning patterns of potential bias in respect to its prosecutorial decisions, and not have to await a defense motion before becoming aware of such pattern (as was represented at the hearing).

1 race were substantially underrepresented on the venire from which his jury was drawn, and that
 2 the venire was selected under a practice providing ‘the opportunity for discrimination’; adding
 3 that “[t]his combination of factors raises the necessary inference of purposeful discrimination
 4 because the Court has declined to attribute to chance the absence of black citizens on a particular
 5 jury array where the selection mechanism is subject to abuse”). No court, however, has applied
 6 *Castaneda* or *Batson* to the specific context of *Armstrong*.

7 The Court therefore cannot say at this juncture that there is some evidence showing that the
 8 prosecutors selected the OSS for defendants because of their race. This conclusion is consistent
 9 with the Ninth Circuit’s decision in *Turner*, 104 F.3d at 1180.

10 In *Turner*, the defendants – five African American men – asserted that “they had been
 11 selected for prosecution on crack cocaine charges on racial grounds.” *Id.* at 1181. The defendants
 12 sought discovery on their selective prosecution claim. “In support of their motions, they
 13 submitted an affidavit of a paralegal in the Federal Public Defender’s Office for the Central
 14 District of California stating that an inspection of closed cases of crack cocaine prosecutions
 15 defended by that public defender in 1991, 1992, and 1993 showed 47 African Americans, 5
 16 Latino, and no white defendants had been charged with crack offenses.” *Id.* at 1182. The
 17 defendants also submitted newspapers articles and a NPR report “commenting on ‘the racial
 18 divide’ in crack cocaine prosecutions” and a study showing that “3% of 8,250 persons charged
 19 with the sale of crack by the Los Angeles District Attorney to be Anglo, 53% to be African
 20 American, 43% to be Latino, and 1% to be ‘other,’” while “[t]he comparable federal breakdown of
 21 43 persons similarly charged was 0% Anglo, 83% African American, 16% Latino, and 0%
 22 Other.”²¹ *Id.*

23 In turn, the government submitted affidavits from both FBI agents and prosecutors. One of
 24 the FBI agents explained, *inter alia*, that “much of the violent crime committed by street gangs . . .
 25 was connected to illegal drug trafficking,” particularly with respect to cocaine base, with the

26
 27 ²¹ The Ninth Circuit concluded that the defendants had failed to provide some evidence of
 28 discriminatory effect because the study was “based on a statistically unimpressive number of
 federal defendants” and failed to show that the small number of white persons who had been
 prosecuted in state court were similarly situated. *Turner*, 104 F.3d at 1885.

1 Bloods and the Crips being the most notorious of those gangs. *Id.* at 1182-83. “[E]nforcement of
 2 the federal laws regarding crack cocaine was one weapon in addressing the problem of gang-
 3 related violent crimes” *Id.* at 1183. The prosecutors all stated that “race and ethnicity had
 4 not influenced their decisions to prosecute.” *Id.* The government also provided a copy of the
 5 USAO’s written prosecutive guidelines regarding drug offenses and an updated report of the
 6 ethnic composition of its crack cocaine prosecutions in Los Angeles – out of 149 defendants, 109
 7 were African American, 28 were Hispanic, 8 were Asian, 1 was white, and 3 were unclassified.
 8 *See id.* at 1183-34.

9 With respect to the issue of discriminatory intent, the Ninth Circuit held that there was not
 10 enough to show that the defendants had been targeted based on their race. The government had
 11 provided a race neutral basis for the prosecution: Gangs were being targeted, not African
 12 Americans, and “the distribution of cocaine by gang members inclined to violence makes the
 13 distribution more heinous and more dangerous than the single sale of cocaine by individuals.” *Id.*
 14 at 1185. The court added:

15
 16 The [defendants] have offered no evidence whatsoever of a intent on
 17 the part of the prosecutors to prosecute them on account of their
 18 race, and the prosecutors and the FBI investigators have under oath
 19 denied such motivation. No reason was given by the district court to
 20 doubt the ‘background presumption] that United States Attorneys
 21 are properly discharging their duties, no reason given to doubt the
 integrity of prosecutors and investigators whose honesty, good faith,
 and absence of racial bias are unimpaired by anything in evidence
 before the court. The district court seems to have neither given
 credence to the affidavits that the government placed before it nor
 explained why the affidavits were not credible.

22 *Id.*

23 Here, as in *Turner*, Defendants have not presented reason to doubt the veracity of the
 24 government’s declarations or the presumption of regularity that applies to prosecutors.²² Should
 25 such evidence arise, however, this issue may be revisited. At this juncture, the Court shall not

26
 27 ²² As noted above, in the first OSS sweep, the U.S. Attorney’s Office decided not to prosecute 6 of
 28 the 20 arrestees. At this juncture, there is no evidence, for instance, that all 6 (in contrast to the 14
 who were prosecuted) were non-African Americans.

1 permit discovery on Defendants' selective prosecution claim.

2 In so ruling, the Court acknowledges Defendants' alternative theory that discriminatory
3 intent can be inferred because the discriminatory intent of the law enforcement officers can be, in
4 essence, attributed to the prosecutors because the prosecutors essentially delegated the
5 decisionmaking to law enforcement officers. *See United States v. Monsoor*, 77 F.3d 1031, 1035
6 (7th Cir. 1996) (in discussing vindictive prosecution claim, stating that, "to connect the animus of
7 a referring agency to a federal prosecutor, a defendant must establish that the agency in some way
8 prevailed upon the prosecutor in making the decision to seek an indictment"). While this may be a
9 viable theory, in the instant case, there is insufficient evidence to support the theory. Notably, for
10 the first sweep, 6 out of the 20 persons presented to prosecution by law enforcement were not
11 prosecuted. This is strong evidence that independent prosecutorial judgment was exercised. For
12 the second sweep, it is true that all 23 persons presented were actually prosecuted. But here the
13 line AUSA declarations (from Ms. Hawkins and Mr. Farnham, who each worked independently
14 from one another) indicate that independent prosecutorial judgment was exercised – *i.e.*, this was
15 not just rubber stamping of law enforcement decisions. *Cf. Beck v. City of Upland*, 527 F.3d 853,
16 862 (9th Cir. 2008) (noting that "[a] prosecutor's independent judgment may break the chain of
17 causation between the unconstitutional actions of other officials and the harm suffered by a
18 constitutional tort plaintiff[;] [p]ut in traditional tort terms, the prosecutor's independent decision
19 can be a superseding or intervening cause of a constitutional tort plaintiff's injury, precluding suit
20 against the officials who made an arrest or procured a prosecution").

21 The request for discovery into selective prosecution is therefore denied without prejudice
22 to a further and future showing should additional evidence be revealed which meets the *Armstrong*
23 standard.

24 VI. DISCOVERY

25 For the reasons stated above, the Court shall permit discovery on the selective enforcement
26 theory, but not the selective prosecution theory. In so ruling, however, the Court does not
27 automatically authorize the breadth of the discovery sought by Defendants. Rather, the Court
28 directs the parties to meet and confer and agree upon a more measured, perhaps phased, approach.


1 *See, e.g., Davis*, 793 F.3d at 722-23.

2 The parties shall report within two (2) weeks from the date of this order to this Court by
3 joint letter whether they can agree on a discovery plan. If not, the parties shall set forth their
4 respective positions in said letter. A Status Conference shall be scheduled for 2:30 p.m., July 20,
5 2016.

6 This order disposes of Docket No. 119.

7
8 **IT IS SO ORDERED.**

9
10 Dated: June 30, 2016

11 
12 _____
13 EDWARD M. CHEN
14 United States District Judge
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CROSS-EXAMINATION OF OFFICER CABILLO

Officer, you were driving in a police car when you first encountered a 2001 Cadillac on August 17, 2014, at approximately 6:35pm?

And you were following the car?

And you turned on your lights and sirens?

And you stopped the car.

You stopped a 2001 Cadillac in the area of 700 Block of Ellsworth Street on August 17, 2014, correct?

And the reason you stopped the car was because it did not have a front license plate?

And this was a violation of the Vehicle Code?

Specifically, vehicle code section 5200(a), which requires that a car have a front license plate?

This is an infraction, correct?

Officer, how many traffic stops do you make a month?

How many did you make last month?

How many of those traffic stops involved African Americans?

If DA objects: Recent statistics kept by the SFPD show that African Americans are three times as likely to be stopped as their white counterparts.

Do you agree that you tend to stop more African American drivers than white drivers?

How many white drivers have you stopped in the past month for not having a front license plate?

How many white drivers have you stopped in the past six months for not having a front license plate?

If DA objects: Statistics kept by the SFPD show that African Americans are more likely to receive tickets for mechanical violations than other races.

So you stopped the car?

At what point did you look into the car to see the occupants?

When you looked into the car did you see the occupants?

And this was before you stopped the car?

And was this before you activated your lights?

And so you saw that the occupants were black before you activated your lights, correct?

When you stop a car for not having a front license plate, what actions do you take if you find that the car does not have a front license plate?

This entitles you to stop a car and write a citation to the driver.

When did you first notice that there was no license plate on the front of the car?

Where was your police car when you noticed that there was no license plate?

Had you already looked to see who was in the car before you saw that there was no license plate?

You then approached the car with your partner, Officer Canning?

And when you went up to the car, you asked everyone in the car for identification, is that true?

Everyone gave you an identification card is that right?

Mr. Seymour gave you his identification?

Ms. Williams gave you her identification?

Mr. Richardson gave you his identification?

And Mr. Richardson told you that she and Mr. Seymour were deciding whether to buy the car from

Mr. Richardson and that Ms. Williams was test driving the car, is that right?

Mr. Richardson told you that he was the owner of the vehicle?

He also told you that Williams and Seymour were about to buy the car and were only test driving it.

And both Williams and Seymour confirmed this as well, correct?

And he showed you paperwork showing you that he was in the process of registering the car?

And he produced paperwork that showed that he had recently purchased the car?

And he showed you this paperwork?

And at this point, you had no reason to disbelieve that what Mr. Richardson had told you?

But at that point, you went back to your car and did a records check to run their identifications and see who the car was registered to, correct?

And it took a few minutes for you to do this?

When you came back, you gave them their identifications back, correct?

Now, at some point, you learned that Ms. Williams driver's license was suspended, correct?

When you find that a person's license is suspended, you sometimes release the car to a licensed driver?

At that point, didn't you say "Don't let an unlicensed person drive a car, and you told him he could drive the car, correct?"

At this point, Mr. Richardson was getting ready to leave, and then you asked him to see the car paperwork again?

And at this point, you came back and said that the plates didn't match the vehicle identification number.

Did you ask him to get out of the car before or after you asked him about the license plate not matching the vehicle identification number?

Did you explain to him why you were asking him to get out of the car?

When you told him about the license plate not matching the vehicle identification number, what did he tell you?

"Richardson explained that he did not know the rear license plate did not belong to the Cadillac because he recently purchased it in the same condition it was now."

Why didn't you just ask him why the license and VIN didn't match?

Did you check the paperwork he had shown you earlier to see if the license plate on the paperwork was the same license plate on the back of the car?

So you ordered that Mr. Richardson step outside of the car?

Why?

So you did this so you could speak to him away from the other two people. Ms. Williams and Mr. Seymour?

Why was that necessary?

Up until the time you asked Mr. Richardson to get out of the car, had you seen a gun or any weapon?

When Mr. Richardson got out of the car, where did you have him stand?

How was he standing?

How long did he stand there?

And you took the paperwork and went back to your car?

And you had them wait there for about 30 minutes while you reviewed the paperwork?

And you came back and asked Mr. Richardson why the rear plate didn't match the vehicle identification number?

And he told you that when he bought the car, that's the plate that was on the car.

And at that point you told Mr. Richardson that you didn't believe him, correct?

Establish that officer believes that client was guilty simply because he stammered when he spoke

Now, in your report, you said that when you asked Mr. Richardson about why the rear license plate did not match the VIN, he "sounded very nervous as he began to stammer as he spoke."

Do you think that just because a person stammers that means that they are nervous?

Do you ever stammer when you speak?

You stammer when you testify?

Does that mean that you are nervous?

Does that mean that you are hiding something?

Do your friends ever stammer when they talk?

Does that mean that they are hiding something?

Now, in referring to Mr. Richardson's voice, you said, "This was very different from the calm and assertive tone of voice he used inside the vehicle earlier."

Did it bother you that Mr. Richardson spoke to you with a calm and assertive tone of voice?

Why did you note that in your police report?

Were you surprised that a black person would speak to you in a calm and assertive tone of voice?

What was it about his voice that made you write that his voice was "calm"?

What was it about his voice that made you write that his voice was "assertive?"

If a person is assertive, does that make you suspect that they are hiding something?

If a black person is assertive, does that make you suspect that they are hiding something?

If a non-black person speaks to you in a calm and assertive tone of voice, is that something you would note in your police report?

How many times in the past have you noted that, for example, a white person spoke to you in a calm and assertive tone of voice?

So if you stopped a white person for a traffic violation, and they spoke to you in a calm and assertive tone of voice, would you note that in the police report?

If DA objects: we are attempting to determine what factors went into the officer's decision to search my client. He noted in his report that my client spoke in a calm and assertive tone of voice and then sounded nervous, so this is fair inquiry since the officer is relying on this in justifying his decision to search my client.

Establish that "Nervous" Behavior May Be tied to officer's implicit bias

Officer, have you ever been nervous?

Does that mean that you are hiding something?

Are there other reasons why you might get nervous?

What was it about Mr. Richardson's behavior that made you believe he was nervous?

Is it unusual for a person to become nervous when they are stopped by the police, in your experience?

Have you ever witnessed people being nervous when you stopped them for a traffic violation?

Do you think that black people are more likely to be nervous than white people when they are stopped for a traffic violation?

Can you think of any white people you stopped in the last six months who became nervous when you stopped them?

What percentage of the white people you stopped in the last six months for a traffic violation became nervous when you interacted with them?

So if a white person initially is calm and assertive, and then they later become nervous, this is a factor you would include in your police report?

Have you ever encounter a white person who was calm and assertive and later became nervous? Did you write this in your report?

Did you check his paperwork to see if the license plate on the car matched the license plate referenced in the paperwork he had?

Mr. Richardson told you to call the person he had bought the car from, a person named "Timothy."

And you told Mr. Richardson that you would not call this person, correct?

Mr. Richardson asked you a second time to call this person named Timothy.

And at this point, you said, "Do you mind if I search you?"

And Mr. Richardson refused?

He said that he did not want you to search him, correct?

He made this very clear to you.

At this point you asked him why, correct?

And Mr. Richardson said that he did not feel obligated to have you search him, or words to that effect?

At this point, you started talking on your police radio.

You and your partner approached Mr. Richardson, correct?

And you asked him if he had any weapons?

And Mr. Richardson said "no" isn't that correct?

At this point, you then started pulling Mr. Richardson's hands behind his back.

He then told you, "There's no need to get crazy."

And it was at this point that he told you that he had a firearm in his right pocket.

And it was at this point that you handcuffed Mr. Richardson?

Isn't it true that what you wrote in your police report about seeing a bulge in Mr. Richardson's jacket is pure fiction?

You never saw a bulge. In fact, you didn't even detect or suspect that he had a weapon until he told you that he had a gun in his right pocket?

Now after Mr. Richardson told you that he had a gun, isn't it true that your partner, Officer Canning, came over, and started roughing him up a bit.

Isn't it true that it wasn't until after you handcuffed Mr. Richardson that you looked into his right pocket?

The right pocket of Mr. Richardson's jacket was zipped?

And you unzipped it while you had Mr. Richardson handcuffed, correct?

Is this a picture of Mr. Richardson handcuffed?

Who is holding him in the picture?

Isn't it true that you handcuffed him before you looked into this pocket?

Is this a picture of the gun inside Mr. Richardson's jacket pocket?

Whose fingers are shown in that photo?

Isn't it true that you never saw a bulge in Mr. Richardson's jacket?

Is it your testimony that this item (gun) was in the pocket of Mr. Richardson's jacket and it created a bulge?

Establish that Officer Presumed that Client Had Weapon When He Saw "Bulge"

Now, after you asked Mr. Richardson to get out of the car, he complied, is that right?

When he got out of the car, what did you direct him to do?

It was at this point that you say that you looked as his coat pocket and saw a bulge protruding from it. Is that your testimony?

Now you could not tell what was inside of it, correct?

Mr. Richardson's coat was heavy and it was made out of leather-like material.

You could not see a gun?

You could not see a weapon?

Now, would you say that everyone who has a bulge in their jacket pocket has a weapon?

So it might or might not be a weapon?

At this point, you decided you were going to pat down Mr. Richardson?

And you made this decision even though you could not tell whether or not he had a weapon in his jacket pocket?

For all you know, it could have been any object that was top heavy, causing a bulge?

You could not see the imprint of a gun?

You could not see any definitive shape or form that indicated that the object was a gun?

How many times have you stopped individuals for traffic stops and found a gun in the last six months?

How many of those people have been black?

Do you think it is more likely that a black person you stop for a traffic violation, ask them to get out of the car and see a bulge has a gun than say, a white person?

What about the fact that Mr. Richardson was young and black?

Did this fact figure into your decision to conduct a pat search?

Did you look to see whether the driver of the car, Angelita Williams, had any bulges in her pockets? Is that because she was a woman?

Establish that Officer has only had limited training in the areas of racial sensitivity and bias

Have you received formal training as a police officer?

Have you received any training on racial bias?

What training have you received?

How many hours?

Who taught you?

What was the curriculum?

Have you ever taken the Implicit Association Test?

Have you ever undergone any testing to determine whether you suffer from racial bias?

Do you know what racial profiling is?

What is racial profiling?

Have you receiving any training on racial profiling?

Do you think that you've engaged in racial profiling in the past?

Do you think you feel more threatened by a young black male than an older white male who is a senior?

Do you think it's more likely that a young black male who has a bulge in his jacket pocket has a weapon than a young white female who has a bulge in her jacket?

So you would search either?

Now, when you saw the bulge in his jacket, you immediately asked him to place his hands over his head.

Is that your practice, whenever you see a bulge you tell them to place their hands over their head?

Why not handcuff the person?

Did you handcuff Mr. Richardson before you pat searched him? Why not?

How do you conduct a pat down of a person?

Do you always ask them to put their hands over their heads?

Did you ask him to put his hands over his heads because you were afraid of what he might do?

Are there sometimes when you conduct pat down searches when you don't ask the person to place his or her hands over their head?

Now when you told Mr. Richardson you were going to conduct a pat down search, he told you that you could not do it because it was his legal right to refuse.

And you said to him that due to the bulge in his right pocket which appeared to be a weapon, you were going to perform a pat down search?

But in fact you did not know the bulge was a weapon. In fact you specifically said in your report that it was an object, not a weapon. So you lied to him?

In fact, according to your report, you could not tell it was a weapon, you only believe it was a weapon because it was a top heavy object?

He made it clear to you that he did not wish to consent and give up his rights, but you still pat searched him anyway?

He complied when you searched him?

And you then patted down his pocket.

And it was only when you patted down his pocket that you recognized the "object" as being a firearm?

Now when you patted down Mr. Richardson's pocket, this is when you recognized the object to be a firearm. In other words, you weren't sure what he had in his pocket until you actually touched his pocket and then felt a gun.

"I immediately patted down Richardson's pocket and felt a metallic object with the outline of a pistol." So what you are saying in your report is that you didn't realize it was a gun until you felt a metallic object in his pocket.

You then write in your police report that "I immediately recognized the object to be a firearm upon first contact with Richardson's coat." So you did not recognize the object to be a firearm before you had contact with Richardson's coat, correct?

Thank you.

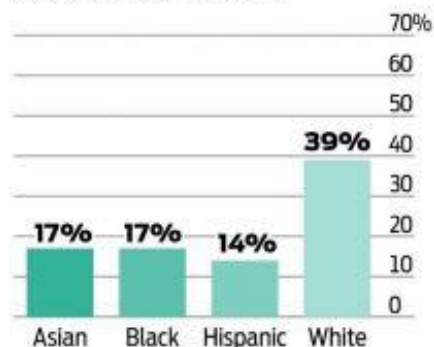
Measuring race in traffic stops

In San Francisco, police officers are required, in an effort to combat racial profiling, to record the race of every driver stopped. In Oakland, officers are required to record the race of every subject during any encounter — whether the person is driving or on foot. Here are the most recent numbers from the two cities:

SAN FRANCISCO

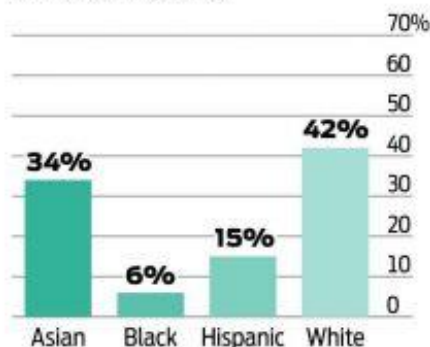
Drivers stopped, by race

January-December 2013



Demographics

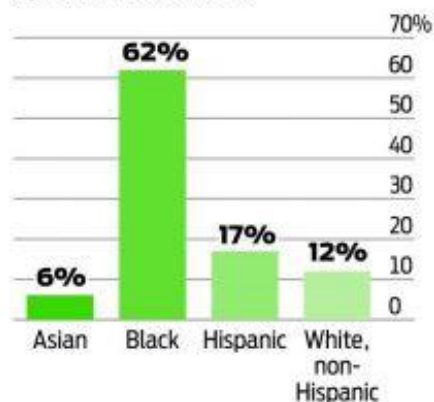
U.S. Census (2010)



OAKLAND

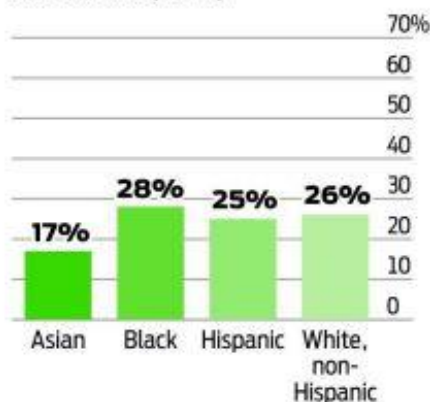
Total police stops, by race

April-November 2013



Demographics

U.S. Census (2010)



Note: Figures do not total 100 percent because not all categories of race are shown.

Sources: San Francisco and Oakland police departments, U.S. Census Bureau

Todd Trumbull / The Chronicle

Blueprint for Racial Justice

A proposal to achieve racial justice through enhancing the work of public defense organizations throughout the country



By Jeff Adachi, James Williams, Amy Campanelli, Keir Bradford-Grey, and Derwyn Bunton

Jeff Adachi is the elected Public Defender of San Francisco. He also serves on the Board of the National Association of Criminal Defense Lawyers and the National Association of Public Defense.

James Williams is the Public Defender for Orange and Chatham Counties, North Carolinas.

Amy Campanelli is the Public Defender of Cook County. She serves on the Board of the National Association for Public Defense.

Keir Bradford-Grey is the Chief of the Defender Association of Philadelphia. She serves on the Board of the National Association for Public Defense.

Derwyn Bunton is the Chief District Defender of the Orleans Public Defender in New Orleans, Louisiana.

Introduction

Public Defenders have always played a critical role in fighting against racial injustice in the criminal justice system. The American criminal justice system was founded on racist principles, and has traditionally and modernly been used as a means to oppress, harass and incarcerate people of color. From the annihilation of Native Americans, to the enslavement of African Americans, the exclusion of Chinese Americans, forced incarceration of Japanese Americans during WWII, and the exploitation of Latino workers, this country has had a long history of racism and discrimination. From the Jim Crow laws, racial profiling, selective enforcement, exclusion of minorities from testifying in criminal cases or serving on juries or serving as judges or government lawyers, racism continues to affect every aspect of our system, from arrest, to bail, plea bargaining and sentencing.

Today, there are over 1,500 federal, state and county public defender and legal aid offices that provide representation to 8 million Americans each year; most public defender clients are people of color. Of the 2.2 million people in prison or jail, nearly half are African-American. Every day, public defenders see the impact that racism and disparate treatment by police, prosecutors and judges has on communities of color.

Legal scholar Michelle Alexander, in her book *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, writes that many of the gains of the civil rights movement have been undermined by the mass incarceration of black Americans in the war on drugs. Alexander has said that “Mass incarceration is a massive system of racial and social control. It is the process by which people are swept into the criminal justice system, branded criminals and felons, locked up for longer periods of time than most other countries in the world who incarcerate people who have been convicted of crimes, and then released into a permanent second-class status in which they are stripped of basic civil and human rights, like

the right to vote, the right to serve on juries, and the right to be free of legal discrimination in employment, housing, access to public benefits.”

With the national Black Lives Matter movement continuing to push greater activism and public awareness and criminal justice and police reforms, public defenders are uniquely positioned to provide leadership to combating racial justice in the courts. When the National Association for Public Defense recently decided to create a Racial Justice initiative, over 80 members responded, volunteering to assist in the effort.

This is an effort to chronicle some of the initiatives that NAPD’s Racial Justice Committee may begin proposing and implementing.

1. Formation of an In-House Racial Justice Committees

One strategy that has been employed successfully is the formation of Racial Justice Committee embedded in each Public Defender’s office. The Racial Justice Committee is staffed by volunteers – attorneys and support staff --- who are interested in designing and implementing racial justice strategies and litigation in their practice. The advantage of developing a committee in-house is that there is an institutional organization which is charged with working on racial justice issues, made up of staff that can decide which strategies are best for their office and locality.

This utilizes the model of participatory leadership, where the leader, in San Francisco the Chief Defender, designates a committee and gives them the ability to formulate, design and execute a plan of action. The Chief can make the plan of action subject to his or her ultimate approval, so he or she can make sure that the plan is consistent with the mission, values and culture of the office.

In San Francisco, the office formed a Racial Justice Committee (RJC) in 2013. The RJC meets once or twice a month, usually on Fridays at noon, and there are two co-chairs who plan the agenda, take minutes and keep track of commitments and projects undertaken by the group. Consistently about a dozen staff members attend. Managers and leadership sometimes attend, but the committee is chaired by line-attorneys. In the three years the group has been meeting, they have sponsored and supported local and statewide legislation (i.e. a state bill that eliminated the use of grand juries by prosecutors in police shooting cases and a local ordinance that requires police to keep and report on racial statistics regarding police contact with citizens), they have sat on police reform committees and helped formulate new policies regarding police use of force and body cameras, they have weighed on

policy issues and testified before commissions, and they have participated in community rallies and support efforts. The RJC also sponsors a regular Court Watch day every other month where students are allowed to visit the office and the courtroom to observe the criminal justice system in action.

The RJC also helps develop litigation strategies such as selective enforcement motions and encourages attorneys and staff to aggressively litigate racial justice issues. For example, the RJC helped develop a bail motion that contains a section on disparate confinement of people of color.

2. Formation of a Regional or Statewide Racial Justice Group

Following the no-indictment decision in Michael Brown's case, five Bay Area public defenders held rallies in front of the courthouses they practice in. This led to the formation of a regional organization titled "Public Defenders for Racial Justice." The regional organization combines defenders from seven Bay Area counties, who are united around litigating racial justice issues in the court. The organization also participates in rallies. There are four committees: Community Bridge Building, Statistics, Education and Training and Advocacy.

Since forming in 2015, the group has held two county-wide trainings, focusing litigating racial justice issues in the context of voir dire, police misconduct and search and seizure. The first training was attended by over 150 defenders, and the second by over 200. Each of the counties has their own in-house Racial Justice Committees.

The existence of a regional group has allowed members of sister public defender organizations to combine their experience and knowledge, compare stories and share resources in litigating racial justice issues in the court.

An extension of the regional racial justice group can also occur statewide. In North Carolina, in addition to efforts by some individual public defender offices regarding racial inequities, the North Carolina Public Defender Association has engaged in a more systemic approach. Therefore, on October 26th of 2011, a group of Chief and assistant public defenders from across the state met to discuss how our community could help undo racism and inequities in our criminal justice system. From this initial meeting in October steps were taken which led to the formation of what soon became the North Carolina Committee on Racial Equity or NC PDCORE. The mission of NC PDCORE is to reduce and ultimately eliminate racial disparity in the criminal

justice system through education, collaboration and litigation. In order to facilitate achievement of our mission, we created a website in early 2014. The website, located here, <http://ncids.com/pd-core/>, is designed to be an ongoing resource for race and criminal justice issues for the public defender community and legal community at large. In April 2014 a monthly E-Blast called Race Judicata was launched by PDCORE. The E-Blasts, written by members of a sub-committee of PDCORE, are sent out on a public defender listserv and read by public defenders across the state. Some other things PDCORE has done is to ensure training on race related issues at public defender conferences and sponsoring forums and relevant documentary screenings on these issues. We also assist individual offices in identifying areas or issues that might be ripe for engagement.

3. Implicit or Unconscious Bias Training

Implicit bias training provides defenders with a greater consciousness on how biases affect other players in the system, such as police, prosecutors and judges as well as defenders themselves. Implicit bias refers to the attitudes or stereotypes which affect our understanding, actions and decisions in an unconscious matter, and are activated involuntarily without an individual's awareness.

Nearly six decades of neuroscience and experimental research has shown that implicit biases deeply affect decision-making in the criminal justice arena. Blind-sentencing exercises have shown that judges sentence individuals to more severe sentences based on the darkness of their skin, and that prosecutors may offer more severe sentences to people of color. Several studies have shown that defense attorneys are not immune to implicit bias, and may make decisions based on their client's race or even their own fears about how a judge or jury may sentence a client more harshly because of their race.

Providing regular training to defender staff on implicit bias is critical to ensuring that defenders are aware of their own biases and how they may affect the handling or outcome of a case. Bias training can also help defenders "de-bias" judges and prosecutors who have power or control over the outcome of a case.

NAPD can develop a list of certified or qualified trainers to provide implicit bias training, and can also arrange for such training, as it has already done, through its webcast trainings.

4. MyGideon: Racial Justice Clearing House

NAPD can provide through its public defender library a clearing house for articles, op-eds, motions and other materials on racial justice issues that have a direct bearing on public defense. Because NAPD has a national network of defenders, we can begin collecting materials that could be shared among NAPD's cadre. MyGideon already has a racial justice page, which can be the place for such materials to be shared.

5. [Racial Justice Training](#)

Public defenders can and should raise issues relating to racial justice in litigating their cases. Race may be relevant to the facts of the case, and certainly may be a factor in selecting a jury. Race may be explored on voir dire, and may result in jurors being excused for cause. Public defenders must also be trained on how to properly handle a Batson-Wheeler objection, when the prosecutor exercises a peremptory challenge based on the juror's race.

Pretrial motions can also raise racial issues, particularly selective enforcement motions, motions to suppress evidence where racial profiling has occurred, using evidence of disparate treatment by law enforcement in evidentiary hearings and the like. Cultural experts can also be called to explain how implicit bias may affect how we judge other's decisions and specific experiences unique to the client's background or community.

Race may also be raised in bail hearings, plea bargaining discussions, sentencing hearings, and whenever race is presented as an issue that may be impacting the outcome of a case.

It often takes great courage for public defenders to raise these issues. In a recent case, a judge agreed to release a defendant from custody in chambers, but then reversed his ruling after seeing that the client was a 6' 3" large black man. When the public defender said "Judge, you had agreed to release him. The only thing that has changed is that you see that he is a large black man." The judge retorted, "Are you calling me racist?" When the defender answered that question in the affirmative, she was held in contempt of court.

When these issues arise, public defenders are sometimes not prepared to deal with them in a way that will further their client's case and the cause of achieving racial justice. NAPD can provide critical training to defenders on these issues, and can help organize trainers, speakers and materials.

6. Community Bridge Building

Defenders often provide support to the communities they serve; this support can take many forms.

Some offices have full-time community organizers dedicated to building trust in communities; the concept of “holistic” representation is a client-centered, community-oriented approach to criminal defense where lawyers and staff take an interdisciplinary approach --- beyond the courtroom – to best represent clients and address underlying issues affecting contact with the criminal justice system. Among the principles of holistic representation are partnering with the community and educating the public.

Many offices offer “Know Your Rights” town halls or presentations, some have implemented “Court Watch” programs, where members of the public are invited to observe court proceedings and write about what they see. The Alameda County Public Defender’s project, L.Y.R.I.C. (Learn Your Rights In California) educates 800 students a year about their constitutional rights and how to interact with police safely while maintaining those rights. Other offices have created innovative programs, such as “Defend Nashville Speaking Tour,” where public defenders humanize their clients through a storytelling series performed at community spaces. The performance is followed by a presentation by the chief public defender detailing the importance of participatory defense. In Tucson, public defenders have organized “Art with Conviction,” a community project that highlights the creativity and artistic contributions of clients who have been convicted of felonies. The goal is to show that people are more and better than the worst thing they’ve done. That understanding and respect fights the stigma of the “convicted felon” label, and enhances criminal justice reform both in the community and the Legislature.

NAPD’s Racial Justice Committee can collect information about the many community programs that are being sponsored by public defenders across the country, and offer them as examples of programs and best practices that other offices may choose to adopt.

7. Ideas generated by the committee members

Bob Boruchowitz (Seattle University Professor of Law, former Seattle Public Defender): I wanted to mention our establishment of a Racial Disparity Project at

The Defender Association some years ago and its continuation in the spinoff nonprofit from my former office that is now taken over by the county. The RDP worked among other things on suspended driver license cases and disparity in drug prosecutions. The Public Defender Association today still houses the RDP which was the key developer of the LEAD project.

Jose Varela (Marin County Public Defender): Creating Sustainable Change Subcommittee. The focus of the committee would be on methods to initiate change within and outside of your office on issues of race and poverty. The goal of the committee would be to create as many options as possible as opposed to a one size fits all approach. We have allies in the community. They know the message that resonates. We need to allow the space for leaders to listen to their communities and work to begin the organic process of sustainable change.

Lisa Schreibersdorf (Executive Director of the Brooklyn Defender's Service): I would very much like NAPD to consider allowing me to chair a committee that will consider class action or local litigation to attack huge portions of the criminal justice system based on racism. In my vision for this type of project, we would lead a partnership of national organizations to recruit law firms from around the country to work on this. I imagine connecting with NACDL, NAACP, ACLU, etc.

We would try to articulate claims we think would at least survive a summary judgment motion—equal protection? Cruel and unusual? I imagine recruiting academics. Some great legal minds who want to be part of blowing up the whole system, casting doubt on the entire structure that we now take for granted, people who well-known and add to the credibility of what we are trying to do.

The way I see the argument is something like this: Because today the vast majority of the people who are arrested are black and Hispanic, the legal procedures that have been put into place for all criminal defendants are, in fact, actually a violation of the equal protection clause, as applied.

Some examples/specific procedures are cash bail, mandatory minimums/sentencing ranges, criminal convictions for low level misdemeanors, jail for failure to pay fines or court fees, enhancements for “gangs” or prior convictions, definitions of “violent” felonies, plea bargaining restrictions, requirement of DA consent for plea bargains, including treatment alternatives.

And although I don't have a legal basis for this in mind, how about declaring that a system that puts so much power in the prosecutor does not meet constitutional standards. There's a way to do this, I just need a bunch of creative and brilliant attorneys to come up with an argument. It's like a Roe vs. Wade or other groundbreaking legal case that pushes the Supreme Court to blow up the whole thing. Or scares everyone that it might blow up.

We would have to decide the basis for the argument, where to bring the claim(s) (fed vs. state, which jurisdiction), how to frame it, how to publicize it, how to find plaintiffs, etc.

Frankly, I believe we can make a difference by shedding light on the parts of the system that take place every day in courtrooms with no audience and putting the whole system on trial. That's my goal.

Alison Bloomquist, (Training Director CT Public Defender Service): We now have a standing racial justice committee, which is just starting and wants to put on implicit bias workshops, as well as cultural sensitivity workshops. We are MacArthur partners, so we are working jointly on projects such as reducing incarceration rates for young people of color. Our annual meeting next year (this fiscal year) will center around racial justice issues and advocacy, and our keynote is Jeff Robinson.

Pre-trial incarceration and sentencing disparity among clients of color is number one for me. Also, race and juror decision-making (my clients of color tried by all white juries, how do we talk about and engage discussion in jury selection and at trial on race without being perceived as "playing the race card.")

Mark Hosken, (Rochester, NY, Federal Defender) I am involved in limited racial justice efforts within my office at this time. I continue to discuss with another member and friend in my office how he & I see things differently and react differently to everyday events in our office, in our jails and in our courthouse. He is black as I am white. I am trying to learn daily how I might better recognize those matters that I am blind to or biased against but unaware of because of my bias.

I would like to work on how I can push back in the courtroom against the bias that pervades bail hearings, suppression hearings, plea bargaining, trials and sentencing hearings. I am encouraged by Professor Anna Roberts'

recent article in the U/Chicago Law Review, Reclaiming The Importance of the Defendant's Testimony - Prior Conviction Impeachment and the Fight Against Implicit Stereotyping. That article has started my wheels spinning as to how the Right to Defense recognized by SCOTUS in *Washington v. Texas*, & *Davis v. Alaska*, might be revisited & extended by new information regarding Implicit Bias. Simply put, I want to push the envelope for my clients throughout the courtroom based on the recognition of Implicit Bias.

Andre Vitale (Training Director, Monroe County Public Defender's Office, NY): We should have a Training Committee and a Community Outreach Committee. We should work on disparities in arrest, bail and plea offers between white defendants and defendants who are people of color. cultural sensitivity training for defense counsel. revisiting and challenging the lawfulness of pretext stops. recognizing and developing responses to disrespectful treatment by judges and prosecutors of our clients and our attorneys.

Jill Paperno (Monroe County Public Defender's Office, NY): There is a TED talk on this that was presented at the New York State Defenders Association trial training - contact Charlie O'Brien at NYSDA.

Nikki Baszynski (Ohio Public Defender's Office): I am the co-chair of our Racial Justice Initiative at the Ohio Public Defender. We collaborate with local organizers, attorneys, and organizations throughout the state, but primarily in the Columbus area. We have prioritized the following issues and actions: - Build relationships with our community and support their work toward change - Fight the criminalization of poverty - Expose charging and sentencing disparities - Improve Ohio's pretrial release/bail system - Provide a forum for the exchange of ideas and concerns regarding race and the justice system that include police brutality and systemic issues that affect our clients - Provide a forum to disseminate information about community activities, protests, and vigils that relate to racial-justice issues - Provide training to attorneys to support the efforts above.

Francis Adewale (Spokane Public Defender's Office): Spokane County Racial Equity Disparity Committee, using the RED Training Toolkit.

Amy Wilson (Maryland Office of the Public Defender): She sent a document that has been sent to MyGideon. Here's a summary: The office has a Diversity and Inclusion Committee. They have agreed to work on the following: Incorporate members of the committee in the recruiting and hiring process, including at colleges and

universities; Increase diversity in leadership positions; Mentor future minority leaders; Create partnerships with law firms in order to support and mentor the committee. The committee has decided that there should be mandatory implicit bias and cultural competency training for all leaders in the organization. The committee is also working on the following activities: Coffee Can Conversations; Cultural Mini-Museum; Celebrate the seven History and Heritage Months; Global Potluck; Celebrate an Ethnic Holiday.

Toussaint C. Romain, (Mecklenburg County public defender): 1. (i) [Racial Equity Network](#) member. We are learning how to raise issues of race in every level of the criminal justice system (pre-trial release to sentencing). It is then our duty to train other lawyers across the state.

(ii) [Race for Juvenile Matters - Implicit Bias training](#) at all levels of our court system from the Clerk, judges, prosecutors, police and public defenders.

(iii) Know Your Rights Seminars: I lead a group of co-workers and we go into high-policed areas and teach community members about exercising their rights. We've provided seminars across North and South Carolina.

(iv) North Carolina Advocates for Justice – [Mass Incarceration Taskforce](#) Member – working with lawyers across the State to end Mass Incarceration and other race related issues.

(v) Developing implicit bias trainings (a) self-awareness; and (b) how to raise issues in our criminal cases/representation.

2. (i) Motions Practice: Developing motions to bring up race and unfair treatment as violations of Constitutional Rights (i.e 14th Due Process, 4th, etc.)

(ii) "Race" Help Desk: A telephone service for Public Def.'s where our attorneys can call in and get support/coaching in how to raise race in their individual case.

(iii) Practical Lessons Incubator: Creating tutorials on "how to raise issues of race" and then using Mock Trial settings to allow folks to practice.

(iv) Courage the Cowardly Public Defender: Teaching public defenders how to have courage to address and bring up issues of race;

Twyla Carter, (King County Public Defender): 1. What racial justice efforts are you engaging in now in your organization? We are currently engaged in the following racial justice efforts in Martin Luther King, Jr. County:

a. The King County Council formed a Juvenile Justice Equity Steering Committee (JJESC). I was appointed to the Committee to represent the Department of Public Defense (DPD). The Committee examines school, police, court and detention policies. We are tasked with establishing short- and long-term actions to help end racial disproportionality in King County's juvenile justice system; defining metrics and creating partnerships to improve the juvenile justice system; identifying root causes of racial disproportionality and specific solutions needed to address them in individual communities; and engaging communities by sharing information, then collecting and incorporating feedback.

b. DPD initiated a policy change in juvenile court to divert youth away from detention by expanding the two-tier warrant system for youth charged with crimes (predominately youth of color). Basically, the expansion allows law enforcement to call the court's screening unit to get a new court date for youth versus booking them into detention.

i. <https://kcyouthjustice.com/2016/03/14/king-county-juvenile-court-changes-to-cut-detention-bookings-by-as-much-as-250-a-year/>

c. DPD recently made a systemic challenge to our jury system. We were not successful, but it started the conversation.

i. <http://www.thestranger.com/seattle/when-a-jury-with-no-black-people-on-it-puts-a-black-man-away-for-the-rest-of-his-life/Content?oid=21628904>

ii. <https://www.wacdl.org/files/jury-diversity-article>

d. DPD has been heavily involved in pretrial bail reform.

i. <http://www.tvw.org/watch/?eventID=2016051095>

ii. <http://www.seattletimes.com/opinion/pleading-guilty-for-lack-of-money/>

iii. <https://www.courts.wa.gov/subsite/mjc/docs/FixingtheMoneyBailSystem.pdf>

iv. <http://www.seattleweekly.com/news/when-bail-is-set-the-rich-walk-and-the-poor-go-to-jail/>

e. DPD is challenging the validity of risk assessment tools due to the use of racially inflected variables.

f. DPD offers regular ongoing training on implicit bias and race-based challenges during jury selection (ie: “Colorado Method” of voir dire).

g. DPD is actively involved in the community. DPD attorneys speak to community members about how to exercise their rights, interact with law enforcement, etc... .

h. DPD provides input to elected officials about potential judicial appointments.

2. What subcommittees should the Racial Justice Committee have? Another way to think about this is what would YOU like to work on?

a. Risk assessments and other tools

b. Finding ways to summons jurors that will yield more jurors of color

c. Working to eliminate bail bondsmen, which have disproportionate impact on defendants and families of color

d. Creating youth-appropriate Miranda warnings and getting law enforcement to use them (since youth of color are disproportionately represented in the CJ system

[Racial Justice Trainers.](#) The following were suggested by members of the committee.

1. Jeff Robinson (suggested by Bob Boruchowitz)
2. Song Richardson (Bob Boruchowitz)
3. Barbara Diamond <http://diamondlaw.org/> (Kate Dunn)
4. Jerry Kang (Alison Bloomquist)
5. Justin Levenson (Alison Bloomquist)
6. Michelle Papillon (Alison Bloomquist)

7. David A. Harris, Law Professor at U/Pitt (Mark Hosken)
8. AFD George Chaney, Jr., SDOH (Mark Hosken)
9. Kitara McClure - kitaramcclure@gmail.com
10. Destiny Peery, Assistant Professor, Northwestern University Pritzker School of Law, Institute for Policy Research Faculty Associate, Department of Psychology (courtesy), Recommended by Amy Campanelli
11. Toussaint Romain, Mecklenburg County public defender

toussaint.romain@mecklenburgcountync.gov

Conclusion

These are only a handful of ideas and programs. As NAPD's Racial Justice Committee grows, more ideas will be added and we will be able to draw on programs, ideas, initiatives, litigation strategies and reforms that represent the commitment, dedication and passion to eradicate racism from the criminal justice system and society at large.